FEDERAL COURT OF AUSTRALIA

CAH17 v Minister for Immigration and Border Protection [2019] FCA 1129

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| Appeal from: | *CAH17 v Minister for Immigration and Border Protection* [2018] FCCA 3573 |
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| File number: | NSD 33 of 2019 |
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| Judge: | **FLICK J** |
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| Date of judgment: | 25 July 2019 |
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| Catchwords: | **MIGRATION** –separate claims by mother and son – alleged failure to separately consider claims of the son – alleged wrongful imputation of adverse credibility against mother upon the son |
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| Legislation: | *Migration Act 1958* (Cth) s 5J  *Federal Court Rules* *2011* (Cth) rr 1.34, 9.61, 9.62, 9.63, 9.64 |
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| Cases cited: | *CAH17 v Minister for Immigration and Border Protection* [2018] FCCA 3573 |
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| Date of hearing: | 29 May 2019 |
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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 |
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| Number of paragraphs: | 29 |
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| Counsel for the Appellants: | Ms E Grotte |
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| Solicitor for the Appellants: | Ms M Byers |
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| Counsel for the First Respondent: | Mr T Reilly |
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| Solicitor for the First Respondent: | Mills Oakley |
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| Counsel for the Second Respondent: | The Second Respondent filed a submitting notice save as to costs |

ORDERS

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|  | | NSD 33 of 2019 |
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| BETWEEN: | CAH17  First Appellant  CAJ17  Second Appellant | |
| AND: | MINISTER FOR IMMIGRATION AND BORDER PROTECTION  First Respondent  ADMINISTRATIVE APPEALS TRIBUNAL  Second Respondent | |

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| JUDGE: | FLICK J |
| DATE OF ORDER: | 25 JULY 2019 |

THE COURT ORDERS THAT:

1. The First Appellant is appointed as the litigation representative of the Second Appellant pursuant to r 9.63 of the *Federal Court Rules 2011* (Cth).
2. The appeal is dismissed.
3. The First Appellant is to pay the costs of the First Respondent, either as assessed or agreed.

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

REASONS FOR JUDGMENT

FLICK J:

1. In the present proceeding the First Appellant, identified by the pseudonym CAH17, is the mother of the Second Appellant, her son. The son is identified by the pseudonym CAJ17. The mother is a citizen of the People’s Republic of China.
2. In February 2015, both the mother and her son made separate applications for a Protection visa, although the son was also included within the mother’s own application. In making those applications, separate submissions were advanced on behalf of the son. Reliance was placed upon claims that he would suffer harm by reason of (*inter alia*):

* the necessity for his mother to pay a “*large fine*” in China to secure the registration of his birth;
* the discrimination he would face due to his parents not being married; and
* the denial of access to schooling and basic government services.

In March 2015, a delegate of the Minister refused the application of both the mother and the son. A review of the delegate’s reasons exposes separate consideration being given by the delegate to “*Applicant 1*” (namely the mother) and “*Applicant 2*” (namely the son). The delegate’s separate consideration of the claims made on behalf of the son directed attention to (*inter alia*) the submission that the son would be considered as a “*black child*” by the Chinese authorities because he was born out of wedlock.

1. In April 2015, an application for review of the delegate’s decision was then filed with the Refugee Review Tribunal. In July 2015, the Refugee Review Tribunal was amalgamated into the Administrative Appeals Tribunal (the “Tribunal”). Prior to that application for review coming on for hearing, but subsequent to the decision of the delegate, there was lodged:

* a *Statutory Declaration* from a Parish Priest stating that the mother had “*repeatedly stated that she intends to embrace the Catholic faith”* and that she had been attending *“religious services and bible study classes*”, had been “*actively involved with our Church community events*” and that she and her son were about to be baptised in the Catholic Church; and
* a *Statutory Declaration* from an “*organist and catechist*” at the Katoomba Catholic church stating that the mother “*told me that she wanted [her and her son] to become members of the Catholic church*”, that she and her son “*attended mass … every week*” and that they were to be baptised on Sunday 21 April 2017.

There was also a “*Summary of Claims*” provided by the mother in March 2017 stating (*inter alia*) that:

* “*…* *it is illegal for a child to practise a religion in China.”*

1. The Tribunal conducted a hearing on 21 March 2017. It delivered its reasons affirming the delegate’s decision on 12 April 2017.
2. Review of the Tribunal’s decision was then sought by the Federal Circuit Court of Australia. That Court dismissed the application in December 2018: *CAH17 & Anor v Minister for Immigration & Border Protection* [2018] FCCA 3573.
3. A *Notice of Appeal* was then filed in this Court in January 2019. Leave was sought at the outset of the hearing of the appeal to file an *Amended Notice of Appeal*. The grant of leave was not opposed and was, accordingly, granted.
4. The *Amended Notice of Appeal* set forth four *Grounds of Appeal*. Each of the *Grounds* was directed at errors said to have been made by the Federal Circuit Court with respect to its consideration of the Second Appellant’s claim. These *Grounds*, in summary form, contended the Federal Circuit Court had:

* “*misdirected itself*” and “*thereby made legal errors*” (*Ground* 1);
* “*made legal errors* *in asking itself the wrong question/issue*” (*Ground* 2);
* “*fail[ed] to find the Tribunal failed to consider all integers of the…claim*” (*Ground* 3); and
* erred “*in finding the consideration of the best interests of the [son] as a primary consideration in accordance with the UN Convention on the Rights of the Child was discretionary*” (*Ground* 4).

Each of these *Grounds* overlapped one with the other, in particular *Grounds* 1 and 2.

1. Notwithstanding the myriad of ways in which the argument was advanced, the principal issue sought to be resolved on appeal was whether consideration had been given by the Tribunal to the separate claims for protection relied upon by the son and whether the Federal Circuit Court Judge had erred in rejecting like arguments as those now advanced on appeal: *Grounds* 1 and 2. At the time of the Tribunal hearing the son was aged about 4 ½ years. It was argued (*inter alia*) that the Tribunal had erred in “*imputing*” or attributing its adverse credibility findings as to the mother’s evidence into its consideration of the claims made by the son: *Ground* 1. Error, it was said, was exposed by considering the claims as though the son had “*no independent exercise of will in accompanying his mother to religious activities*”: *Grounds* 1 and 2. Although this was the principal argument, it was also argued (*inter alia*) that the Tribunal had:

* erred in only considering the claim that the son was a “*black child*” (*Ground* 3);
* failed to consider a claim that “*it is illegal for a child to practise a religion in China*” (*Ground* 3); and
* erred in finding that “*both applicants had engaged in religious activities in Australia solely for the purpose of enhancing their claims to protection*” (*Grounds* 2 and 3).

The Federal Circuit Court, each of the *Amended Grounds of Appeal* contended, had erred in not so concluding.

1. On the hearing of the appeal, Counsel appeared for both the mother and the son. But submissions were only advanced on behalf of the son. The mother was taken to have abandoned her appeal. The mother sought, and was granted at the outset of the hearing of the appeal, an order pursuant to r 9.63 of the *Federal Court Rules* *2011* (Cth) (“*Federal Court Rules*”) that she be appointed as the litigation representative of her son. Compliance with the balance of *Rules* 9.61, 9.62(1)(b), 9.63(2) and (3) and r 9.64 was dispensed with pursuant to r 1.34 of the *Federal Court Rules.* Counsel appeared on behalf of the Respondent Minister. The Second Respondent filed a *Submitting Notice*, save as to costs.
2. The appeal is to be dismissed with costs.

### The Tribunal’s consideration of the son’s claims

1. No question is raised as to the manner in which the delegate had resolved those claims for protection previously relied upon by the son in advance of the Tribunal hearing.
2. The submissions on behalf of the son before this Court largely focussed upon the claim for protection advanced subsequent to the delegate’s decision, being those claims founded upon his religious practice and commitment to being baptised into the Catholic Church. This aspect of the claim was before both the Tribunal and the primary Judge.
3. It should be noted that the Appellants’ submissions also included a contention (with respect to *Ground* 3) that the Federal Circuit Court had erred with respect to the “*black child*” claim, which was a claim before the delegate.
4. Focussed upon the religion aspect of the son’s claim, the Tribunal addressed “[*t*]*he applicants’ religion*”, noting that:

101. … the Tribunal had concerns about the timing of the religious involvement of both herself and the second applicant.

It then concluded with respect to both the mother’s claims and those of her son as follows:

112. The Tribunal has carefully considered and weighed up her evidence about her faith, the timing of the commencement of her religious activities, and other concerns with her credibility. However, the Tribunal considers that the applicant’s evidence indicates that she (and the second applicant) has undertaken religious activities only after the rejection of their claims by the delegate, in order to remain in Australia. The Tribunal considers that this undermines that she (and the second applicant) have undertaken religious activities for genuine reasons.

The Tribunal thereafter proceeded to make findings, including the following (without alteration):

**FINDINGS OF FACT ON THE APPLICANT’S CLAIMS**

118. On the basis of the adverse credibility finding, the Tribunal does not accept that the applicant is a witness of truth. The Tribunal considers that she has been prepared to change evidence depending upon the particular situation, and that she is prepared to give any evidence in order to obtain a protection visa for herself and her child to remain in Australia.

**Religion**

119. The applicant claims that she and the child have had religious involvement from the time she was in detention (December 2014-February 2015), including attending church from April 2015, and bible study from August 2015, as well as other activities. She claims that she intends to be baptised on 21 April 2017. She claims that she and the child would continue their religious involvement including studying the Bible and learning more if they return to China. The Tribunal has taken into account the support documents.

120. On the basis of the adverse credibility finding, the Tribunal does not accept that the applicant’s involvement in Christianity (on her behalf or on behalf of her child) is genuine. The Tribunal finds that she decided to attend Christian activities in April 2015, the month after the claims of herself and her child were dismissed by the Department. While the Tribunal is prepared to accept that the applicants have undertaken the claimed religious activities while the proceedings have been ongoing, and that they have indicated an intention to get baptised in April 2017, the Tribunal is not prepared to accept that these actions were (or will be) undertaken for genuine reasons.

121. Having regard to this finding, the Tribunal consider that the applicants will not undertake any religious activity in China as they are not genuine Catholics, and thus the Tribunal does not accept that they face a real chance of serious harm or a real risk of significant harm on the basis of religion.

122. Australian religious activities – refugee claims: At the hearing the Tribunal had put to the applicant its concerns that she did not appear to be a genuine Catholic, and that it appeared that the involvement in religious activities on behalf of herself and her son may have occurred in order to strengthen their protection visa claims. The Tribunal put to the applicant that if she and her son had been attending religious activities in order to strengthen their claims then it would have to disregard church involvement and activities in the refugee assessment, and it would find that neither she nor the second applicant would undertake religious activities in China. In response the applicant said that this might be the Tribunal’s thinking but her belief is that the Lord will give her peace and strength to raise her child as a single mother. The Tribunal finds that the religious activities undertaken by both applicants in Australia were done for the purposes of their refugee claims and it disregards all of these activities.

123. Australian religious activities – complementary protection: However, the conduct in Australia is not to be disregarded when considering the claims under s. 36(2)(aa). Thus, while the Tribunal accepts that the applicants engaged in some religious activities in Australia, it was not suggested that there was a real risk that the authorities or anyone in China would find out about this. The Tribunal is not satisfied on the evidence before it that the applicants’ religious activities in Australia would lead to them facing a real risk of significant harm in China.

124. The Tribunal considers there is no basis to find that the applicants have a well-founded fear of persecution or face a real risk of significant harm in China on the basis of religion.

(footnote omitted)

1. When considering the factual issues surrounding the claim that the son was born out of wedlock and hence a “*black child*”, the Tribunal considered the ability to secure the “*registration of the birth of the son and the payment of a social compensation fee*”. In doing so, the Tribunal considered and made findings in respect to what it referred to as:

* “*De-linking of hukou and social compensation fee*”;
* “*The amount of the social compensation fee*”;
* “*Ability to pay the fee for the applicant, poverty and threatened survival*”;
* “*Refugee claims: Law of general application*”;
* “*Complementary protection*”;
* “*Discrimination, gossip*”; and
* “*Involuntary sterilisation*”.

1. After giving consideration to these issues, the Tribunal concluded with respect to the mother, in part, as follows:

162. The Tribunal is not satisfied on the evidence before it that there is a real chance or real risk of the [mother] being subjected to such measures, particularly as the Tribunal would expect her to have referred to such a significant concern in her application form and when asked by the Tribunal. The Tribunal is not satisfied that there is a real chance or real risk that the applicant faces being subjected to a real chance of serious harm or a real risk of significant harm as a result of China’s family planning laws or in the form of sterilisation or intrusive contraception.

### The conclusions of the Federal Circuit Court

1. The findings of the primary Judge which Counsel contended were of principal relevance to the son’s appeal were as follows ([2018] FCCA 3573):

30. The second applicant was aged 4½ at the time of the Tribunal decision. Plainly, he could not articulate his claims himself and it would almost certainly have been inappropriate for the Tribunal to question him at the Tribunal hearing. The simple fact is that the second applicant was entirely dependent upon his mother to articulate his claims. The Tribunal made comprehensive adverse credibility findings against her which necessarily impacted upon the claims of both applicants.

31. It is unfortunate that at [112] the Tribunal used terminology suggestive that both applicants had engaged in religious activities in Australia solely for the purpose of enhancing their claims for protection. It is not appropriate to impute a dishonest motive to a child, especially a child of tender years. The reasoning, however, is explicable on the basis that the second applicant had no independent exercise of will in accompanying his mother to religious activities and that is was the mother’s motivation which was being impugned.

…

33. The applicants’ submissions claim that the Tribunal was obliged to consider the best interests of the second applicant as a primary consideration in accordance with the UNCRC, relying on *Minister for Immigration v Teoh*. However, this submission was misconceived. It is well established that the Tribunal was not making a discretionary decision and so *Teoh* does not apply.

34. The applicants’ submissions also claim that the Tribunal did not consider the second applicant’s claims “separately”, relying on *Chen Shi Hai v Minister for Immigration*. However the Tribunal expressly considered the claims of the second applicant to fear persecution as a “black child”, and found that he would not be a “black child” as claimed because he would be registered. There is accordingly no basis for the submission that the second applicant’s claims were not considered in accordance with *Chen Shi Hai*. The ability of the applicant to pay the social compensation fee was relevant to whether the second applicant would be a “black child” and so was necessarily relevant to his claims, but that does not indicate that his claims were not considered on the basis that he was an individual. The Tribunal did not reason that because the applicant’s claims failed, the second applicant’s necessarily failed too, unlike in *Chen Shi Hai* at [75].

(footnotes omitted)

### A wrongful imputation of adverse credit findings of the mother upon the son

1. Such consideration as was given by the Tribunal to the separate claims being advanced on behalf of the son were said to be vitiated by the wrongful imputation of adverse credit findings made against the mother upon the son. And, of present relevance, in *Ground* 1 it was contended that the Federal Circuit Court misdirected itself, with respect to the son’s claims, by (*inter alia*) finding that “*comprehensive adverse credibility findings against the mother necessarily impacted upon the claims of the [son]*”(cf. [2018] FCCA 3573 at [30]). The contention in the present proceeding was that the son’s claims should have been considered separate and distinct from any assessment made as to the manner in which the Tribunal assessed the credibility of the mother’s evidence. A further but related contention was the contention that the Federal Circuit Court had erred by considering the claims as though the son had “*no independent exercise of will in accompanying his mother to religious activities*…”: cf. [2018] FCCA 3573 at [31].
2. The fundamental difficulties confronting the son’s claims were at least twofold, namely:

* the fact that the Tribunal noted in its reasons (at para [42]) “*that the applicant was also giving evidence on behalf of the child*”; and
* the fact that the Tribunal had before it a claim made by the son that he attended the Katoomba Catholic church and was about to be baptised.

It was not disputed either before the primary Judge or on the hearing of the appeal that the mother, when appearing before the Tribunal, was in fact “*giving evidence on behalf of the child*”. It was thus difficult for the Tribunal to separate out any assessment as to the credibility of the mother’s evidence from an assessment as to the separate claims made by the son. The claims made by the son necessarily had to be resolved by reference to the evidence given by the mother on his “*behalf*”, together with such other evidence as there was available. The adverse finding made by the Tribunal as to the “*credibility*” of the mother’s evidence could not be divorced from such evidence as she gave on her own behalf and that given on behalf of her son. Her evidence, the Tribunal concluded, changed “*depending upon the particular situation*” and further concluded that she was “*prepared to give any evidence in order to obtain a protection visa for herself and her child to remain in Australia*” (at para [118]). Such other evidence as was available to the Tribunal from sources other than the mother, namely from the parish priest and the organist, depended upon the observations of those two persons of the 4½ year old son attending church with his mother and what they had been told by the mother.

1. The Tribunal, it is concluded, separately addressed the claims made by the son. The findings made by the Tribunal were findings open to be made. No error was committed by the Tribunal in resolving those separate claims by reference to the evidence given by the mother on her son’s behalf. The adverse findings as to the credibility of the mother were not impermissibly “*imputed*” to the son. Any suggestion that the Tribunal erred in not eliciting evidence from a 4½ year old child and in not separately questioning the son as to his religious practices and wishes, with respect, had an air of unreality. Not surprisingly, although the son was in attendance at the hearing before the Tribunal, it was not contended at the hearing of this appeal that it was suggested by anyone participating in the Tribunal hearing that the son wanted to give his own evidence, separate from that given by his mother, or that it would be of assistance to ask questions of the son. No error is exposed in the Federal Circuit Court proceeding upon the basis that the reasons of the mother and the son were the same when attending (for example) “*religious activities*”.
2. The primary Judge, with respect, did not misdirect himself by “*asking … the wrong questions*”. Although Counsel on behalf of the son posed a series of questions which should have been asked, presumably by the Tribunal as well as the primary Judge when reviewing the findings of the Tribunal, the findings as made by the Tribunal and the basis upon which they were made exposes no error on the part of the Tribunal or the primary Judge.
3. The Federal Circuit Court thus did not misdirect itself by finding that the adverse credibility findings necessarily impacted on the claims of the son.

### The remaining arguments

1. In respect to the argument that the Tribunal had erred in failing to “*consider all integers of the [son’s] claims*” and “*in only considering the ‘black child’ claims*”, the written submission advanced on behalf of the son before this Court was that the Circuit Court Judge had erred “*in finding that the Tribunal had considered the child’s claims separately, because it had considered his fear of persecution as a ‘black child*’”. The submission continued on to contend that “*the primary Judge does not deal with whether the Tribunal dealt with the claim regarding the legality of being able to practise religion in China, which was a claim made on behalf of the child*”.
2. A reading of the Tribunal’s reasons exposes consideration being given by it to the factual materials before it. There was no “*integer*” of the claims made that was not considered. Even if it were to be assumed that the Tribunal was required to consider a claim that it was “*illegal for a child to practise a religion in China*”, any necessity to do so was subsumed by the Tribunal’s finding that the mother and child “*will not undertake any religious activity in China as they are not genuine Catholics*” (at para [121]).
3. Nor is any error exposed in the manner in which the Tribunal considered the question as to whether the mother (and son) pursued religious activities for the purposes of strengthening their claims to refugee status in Australia. The Tribunal “*put to*” the mother the dilemma it faced: if it were to be concluded that she had pursued religious activities to strengthen her claims, her evidence as to the pursuit of such activities may have to be disregarded (at paras [120] and [122]) by reason of s 5J(6) of the *Migration Act* (1958) (Cth). Albeit forming part of the reasoning process which impacted upon the adverse findings as to credibility, a finding necessarily remains that the Tribunal did not accept “*that the applicant is a witness of truth*” (at para [118]) and did not accept “*that the applicant’s involvement in Christianity (on her behalf or on behalf of her child) is genuine*” (at para [120]). These findings were sustainable even in the absence of any consideration given to whether the mother pursued religious activities to strengthen her claims.
4. The remaining contention raised in the final *Ground of Appeal* focussed upon para [33] of the reasons for decision of the primary Judge. Irrespective of any error that may have been exposed by the primary Judge’s conclusion that the consideration of the best interests of the son (as a primary consideration in accordance with the *UN Convention on the Rights of the Child*) was discretionary, the error assumes no relevance given the other conclusions reached. Irrespective of what consideration was to be given to the best interests of the son, any consideration would have led to no different conclusion.

## CONCLUSIONS

1. The *Grounds of Appeal* are rejected. Although considerable attention has been focussed upon the reasons of the Tribunal, perhaps at the expense of the reasons of the primary Judge whose decision is under appeal, the ultimate conclusion is that the primary Judge did not err in concluding that the findings and reasons of the Tribunal did not expose reviewable error.
2. Although no submissions were advanced on behalf of the mother in the hearing of the present appeal, it should nevertheless be noted that no error is self-evident in the manner in which the Tribunal resolved her claims and (more importantly) no error self-evident in the reasons of the Federal Circuit Court in dismissing her application.
3. There is no reason why costs should not follow the event. The costs should be paid by the mother.

## THE ORDERS OF THE COURT ARE:

1. The First Appellant is appointed as the litigation representative of the Second Appellant pursuant to r 9.63 of the *Federal Court Rules 2011* (Cth).

2. The appeal is dismissed.

3. The First Appellant is to pay the costs of the First Respondent, either as assessed or agreed.

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| I certify that the preceding twenty-nine (29) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Flick. |

Associate:

Dated: 25 July 2019