FEDERAL COURT OF AUSTRALIA

EDK17 v Minister for Immigration and Border Protection [2018] FCA 1258

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| Appeal from: | *EDK17 v Minister for Immigration & Anor*  [2018] FCCA 708 |
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| File number: | NSD 467 of 2018 |
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| Judge: | **DERRINGTON J** |
|  |  |
| Date of judgment: | 22 August 2018 |
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| Catchwords: | **MIGRATION** – where IAA found applicant did not meet criteria for grant of a visa on complimentary protection grounds – where appeal to FCC was that the IAA had made a legally unreasonable finding of fact – where there was sufficient material before the IAA to support its conclusions – whether primary judge made an unreasonable finding of fact – held, considering evidence no real risk of significant harm – no unreasonableness |
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| Legislation: | *Migration Act 1958* (Cth) |
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| Cases cited: | *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223  *BTW17 v Minister for Immigration* (2018) 353 ALR 657  *Minister for Immigration and Border Protection v Stretton* (2016) 237 FCR 1  *Minister for Immigration and Border Protection v SZVFW* [2018] HCA 30  *Minister for Immigration and Citizenship v SZMDS* (2010) 240 CLR 611  *Minister for Immigration v Li* (2013) 249 CLR 332 |
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| Date of hearing: | 20 August 2018 |
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| Registry: |  |
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| Division: |  |
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| National Practice Area: |  |
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| Category: | Catchwords |
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| Number of paragraphs: | 25 |
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| Counsel for the Appellant: | Mr O Jones |
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| Counsel for the Respondents: | Mr G Johnson |
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| Solicitor for the Respondents: | Mills Oakley Lawyers |

ORDERS

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|  | | NSD 467 of 2018 |
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| BETWEEN: | EDK17  Appellant | |
| AND: | MINISTER FOR IMMIGRATION AND BORDER PROTECTION  First Respondent  IMMIGRATION ASSESSMENT AUTHORITY  Second Respondent | |

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| JUDGE: | DERRINGTON J |
| DATE OF ORDER: | 22 AUGUST 2018 |

THE COURT ORDERS THAT:

1. The appeal be dismissed.
2. The appellant 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

DERRINGTON J:

## Introduction

1. This is an appeal from a decision of the Federal Circuit Court (FCC) of 12 March 2018 which dismissed an application for review of the decision of the Immigration Assessment Authority (IAA) made on 23 June 2017. By that decision the IAA affirmed a decision of the delegate of the Minister for Immigration and Border Protection (the Minister) refusing to grant the appellant a Safe Haven Enterprise (Class XE) Visa (SHEV).
2. Before this Court the sole ground of appeal is:

The primary judge erred by concluding that the Authority had not made a legally unreasonable finding of fact with respect to the question of whether the applicant would be located by the family of his alleged victim in Beirut, in circumstances where there was material before the Authority and otherwise relied upon by the Authority which supported the conclusion that the applicant would be so located.

1. That issue relates to the appellant’s claim that he was entitled to a SHEV based upon the complementary protection criteria in s 36(2)(aa) of the *Migration Act 1958* (Cth) (*Migration Act*).

## Background

1. The appellant is a citizen of Lebanon. He is a Sunni Muslim from the Northern District of that country. His parents and 12 of his siblings remain living in that location. He claims that in 2013 he fled Lebanon because he was threatened by the militant group Jabhat Al-Nusra (JN). He travelled legally from Lebanon to Indonesia. From there he travelled by boat to Christmas Island, destroying his passport along the way. One of his brothers travelled on the same boat.
2. On 23 December 2016, he made an application for a SHEV. He claimed a fear of harm from members of JN if he were returned to Lebanon because he had refused to join that organisation. Subsequently, he has made a further claim to the effect that he faces a real risk of harm from the family of a woman who has made allegations of aggravated sexual assault against her by him. That alleged event is said to have occurred in Australia and whilst he has been charged, as at the date of the delegate’s decision, the matter was continuing.
3. On 10 May 2017, the delegate refused to grant the appellant a SHEV. The delegate concluded that the appellant’s fear of harm at the hands of JN was not well founded. Whilst it was found that the appellant was at a risk of significant harm from the family of a woman whom it was alleged he assaulted, it was also found that, if he returned to Lebanon, he could safely relocate to Beirut. On that basis it was determined that his circumstances did not fall within the complementary protection provisions.
4. The IAA affirmed the delegate’s decision. On 15 September 2017, the appellant applied for judicial review to the FCC.

## Decision of the IAA

1. Much of the decision of the IAA is concerned with the appellant’s claim for protection under the Convention grounds. That related to his assertion that he would be targeted by JN because he would not agree to become a member. That claim is no longer pursued.
2. With respect to the ground under the complementary protection provisions the substance of the IAA’s decision was as follows:
   1. It was found that the appellant did not face a chance of serious harm at the hands of JN. That was significant because it was through JN that the appellant asserted the family of his alleged victim would locate him were he to return to Lebanon.
   2. It was accepted as plausible that the appellant faced a risk in relation to a vendetta by the family of his alleged victim and, although the extent of any harassment or harm may have been speculative, the IAA was prepared to accept that he may face a risk of significant harm as defined under s 36(2A) of the *Migration Act*.
   3. That if he did face harassment or threats from his alleged victim’s family, the law enforcement authorities would be able to provide a degree of protection although it would be difficult in his home village.
   4. He could relocate to another area of Lebanon, such as Beirut, where there are opportunities for employment and a greater degree of State protection. The IAA recorded that the appellant claimed that JN was able to locate him anywhere and that as his family name was uncommon he would be capable of being identified such that he would be as vulnerable in Beirut as in his home village.
   5. There was no evidence that the appellant’s alleged victim’s family had any link with JN or other official or paramilitary organisations or that it has any links to, or influence in, Beirut.
   6. The IAA was not satisfied that the appellant’s location in Beirut would become known to the family because of his name or by his comments on Facebook.
   7. The IAA was not satisfied that the victim’s family would be able to locate the appellant in Beirut and he would not face a real risk of significant harm if he were to relocate there.
   8. In the circumstances, it was reasonable for him to relocate to Beirut an area with which he was familiar. He would be able to live amongst the same religious and ethnic community and would find support in the Sunni majority neighbourhood. He was also a person who would be able to secure employment because of his qualifications and because he had worked there previously.
   9. Consequently, the IAA found there were no substantial grounds for believing that, as a necessary and foreseeable consequence of being returned from Australia to Lebanon as a receiving country, there is a real risk he would suffer significant harm.

## Application to the FCC

1. The only ground of the application for review to the FCC was that the IAA had made a legally unreasonable finding of fact with respect to the question of whether the appellant would be located by the family of his alleged victim in Beirut as there was material before the IAA which supported the conclusion that the appellant would be so located. In the course of oral submissions Mr Jones for the appellant submitted that this was sufficient to vitiate the decision and there was no need to consider the materiality of the finding. That submission can be accepted in the circumstances of the present case although it would not necessarily be true in all cases.
2. The appellant’s argument was rejected by the FCC. After reviewing the decisions of the delegate and of the IAA, the learned primary judge considered in some detail the decisions in *Minister for Immigration v Li* (2013) 249 CLR 332 and *BTW17 v Minister for Immigration* (2018) 353 ALR 657, the following points were made:

(a) That the focus of attention was on the IAA’s conclusion that, after considering all the information and evidence, the decision maker was “not satisfied that the victim’s family would be able to locate the applicant in Beirut”. It was necessarily part of the appellant’s claim under the complementary protection provision that he would be so located.

(b) The point advanced by the appellant was that there was an ample trail for ascertaining whether he was in Beirut and this trail of association shows it was “legally unreasonable for the Authority to conclude that it was not satisfied that the alleged victim’s family would be able to locate him in Beirut”.

(c) That assertion was based upon the proximity of the appellant’s home village to Beirut; that the appellant’s brother commuted between the two on a daily basis; that the appellant had worked in Beirut in his brother’s shop previously; and, that the Tribunal had suggested he could reside near his brother’s shop.

(d) The learned primary judge rejected the submission as to the absence of evidence. It was noted the IAA was aware of the information before the delegate which identified the alleged victim’s family was located in the Northern part of Lebanon and there was an absence of any links to or influence in Beirut. It was also noted that the location of the brother’s shop in Beirut, being 2 hours from his village in North Lebanon, did not provide a ground, either on its own or cumulatively with other grounds, to suggest that the IAA’s state of non-satisfaction was unreasonable.

(e) It was also noted that there was no evidence of the family having any links with JN or any other official or paramilitary organisation and there was no claim or evidence that the family had any links or influence in Beirut.

(f) On this topic the learned judge below concluded:

41. Contrary to the case put by the Applicant, there is nothing to show that the process of reasoning undertaken by the Authority in identifying and putting into context that the Applicant’s family name was uncommon, that the alleged victim's family has no links to or influence in Beirut, and that there are no other claims than general comments in relation to being on Facebook, and no evidence before the Authority that the alleged victim's family would be able to track the Applicant down if he was to relocate to Beirut, was unreasonable. On the basis of the material before the Authority, weighing the circumstances of the Applicant's brother's shop in Beirut does not lead to an unreasonable conclusion by the Authority that it was not satisfied that the alleged victim's family would be able to locate the Applicant in Beirut.

(g) Consequently, the FCC determined that the IAA’s finding of non-satisfaction as to the alleged victim’s family’s capacity to locate the appellant in Beirut did not disclose any jurisdictional error. Its conclusion that it was reasonable for the appellant to relocate to Beirut, being an area where there was no real risk that he will suffer significant harm, was not shown to be legally unreasonable.

## Consideration

1. Before this Court the appellant seeks to re-agitate the issue which it did before the FCC. The principles applicable to a determination of whether an administrative decision is legally unreasonable were considered in the several judgments of the High Court in *Minister for Immigration and Border Protection v SZVFW* [2018] HCA 30, although the formulation of those principles were not identical. Despite that, it appears it can now be said with some certainty that the Court has well and truly departed from the test in *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223 that a decision may be unreasonable only if no reasonable person could have made it. On the other hand, such reformulations have not signalled any significant relaxation of the standard necessary for interference with an administrative decision on this ground. It remains acknowledged that the test for unreasonableness is necessarily stringent because the Courts will not lightly interfere with the exercise of a statutory power involving an area of discretion (at [11]). Kiefel CJ identified that a decision made in the exercise of a statutory power is unreasonable when it lacks an evident and intelligible justification. That may be so where the decision is one which no reasonable person could have made although the mere fact that a decision appears irrational does not generate an inference of unreasonableness (at [10]). Similarly, Nettle and Gordon JJ identified at [82] that legally unreasonable decisions are not limited to those which are “manifestly unreasonable” or what might be described as irrational or bizarre or were such that no reasonable person could have arrived at it. Their Honours identified that a conclusion of legal unreasonableness may be outcome focussed where, for instance, there is no “evident and intelligible justification” for it. Their Honours cited with approval the observations of Gageler J in *Minister for Immigration and Citizenship v Li* to the effect that the reasonableness of a decision extends to “whether the decision falls within the range of possible, acceptable outcomes which are defensible in respect of the facts and law”.
2. Mr Jones for the appellant correctly submitted that, if this Court finds that the exercise of power by the decision maker was unreasonable it must act on that conclusion even if it was reasonably open to the judge at first instance to determine that the decision was reasonable: *SZVFW* at [85] – [87] *per* Nettle and Gordon JJ.
3. The appellant, in his written submissions, recognises that despite the perhaps more liberal formulation for the test of unreasonableness, the Court should be slow, although not unwilling, to interfere in an appropriate case and, at the least, the appellant must establish that the decision is “one which no rational or logical decision maker could arrive on the same evidence”: *Minister for Immigration and Citizenship v SZMDS* (2010) 240 CLR 611; [124], [130].
4. There is nothing in the various judgments in *SZVFW* to oust the proposition that unreasonableness does not include those cases where a Court may have come to a different conclusion. Where reasonable minds might adopt different reasoning or might differ in any decision or finding to be made upon evidence, it is unlikely that it can be said that any one decision is irrational or illogical. In cases where the relevant evidence can give rise to different processes of reasoning such that logical or rational or reasonable minds might differ in respect of the conclusions, it cannot be said that any decision falling within the permissible range is unreasonable: *Minister for Immigration and Citizenship v SZMDS* (2010) 240 CLR 611 at [131] *per* Crennan and Bell JJ. This proposition as summed up most aptly by Wigney J in *Minister for Immigration and Border Protection v Stretton* (2016) 237 FCR 1 at [92] where his Honour said:

In circumstances where reasonable minds might differ about the outcome of, or justification for, the exercise of power, or where the outcome falls within the range of legally and factually justifiable outcomes, the exercise of power is not legally unreasonable simply because the Court disagrees, even emphatically, with the outcome or justification. If there is an evident, transparent and intelligible justification for the decision (*Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332 at [76], [105]; *Minister for Immigration and Border Protection v Singh* (2014) 231 FCR 437 at [44]-[45]), or if the decision is within the “area of decisional freedom” of the decision-maker (*Li* at [28], [66], [105]; *Singh* at [44]), it would be an error for the Court to overturn the decision simply on the basis that it would have decided the matter differently.

## The appellant’s submission

1. The appellant’s submission amounted to the proposition that because there was ample proximity and connections by which the appellant could be traced from Northern Lebanon to Beirut, it was unreasonable for the IAA not to reach the state of satisfaction that the victim’s family would not be able to locate the appellant in Beirut. The submission relied upon:
   1. The appellant’s village being only a 2 hour commute from Beirut;
   2. The appellant’s brother commuting on a daily basis from the village to his shop in Beirut;
   3. The appellant had worked in the past at his brother’s shop in Beirut;
   4. The appellant would be well placed to resettle near his brother’s shop and in a Suni majority neighbourhood; and
   5. The appellant had an uncommon family name.
2. It must be kept in mind that the focus of attention is upon a specific step in the reasoning process of the IAA, being its conclusion at the end of paragraph 35 of its reasons to the effect:

I have considered all of this information and evidence and I am not satisfied that the victim’s family would be able to track the applicant down if he was to relocate to Beirut.

1. Mr Jones for the appellant submitted that this state of non-satisfaction reached by the IAA could be characterised as unreasonable because, in the context of the above elements of proximity, it lacked an evident and intelligible justification. That was so, it was submitted, because there was no relevant justification for the Authority to hold otherwise and especially so because the appellant would be likely to use his connections in Beirut.
2. Mr Johnson for the Minister submitted that the IAA’s decision did have a relevant justification and that the process adopted by the IAA was to consider each of the elements relied upon by the appellant as to why it was that he might be located by the alleged victim’s family and indicate why they did not give rise to an expectation that the appellant would be located in Beirut.
3. The essence of the Tribunal’s reasons (at [35]) was that it was not prepared to accept some threat of harm from his alleged victim’s family. That family had no connection with JN or other official or para-military organisation and so they did not have the network to track him down in Lebanon. The Tribunal was also not satisfied the alleged victim’s family had any links or influence in Beirut which they might use to ascertain where he might be. The Tribunal further found that it was not satisfied the appellant’s location in Beirut would become known merely because of his uncommon name. Apart from the appellant’s Facebook comments the Tribunal found that, “there are no other claims or evidence before me that the victim’s family would be able to track the applicant down if he were to relocate to Beirut”.
4. In other words, the IAA considered the matters advanced by the appellant as supporting the proposition that the victim’s family would be able to locate him, indicated that they did not support the contention and concluded that it had not reached the state of satisfaction that the appellants contention was correct. It cannot be said that the conclusion lacked an “evident and intelligible justification”. It is merely a determination that, for the reasons given, the matters relied on by the appellant were insufficient to enable the decision maker to reach a conclusion that the victim’s family would be able to locate the appellant in Beirut. The IAA identified an absence of evidence which would suggest that the victim’s family would be able to locate the appellant in Beirut. It identified the absence of links with JN or any other paramilitary group which would suggest that the family had the ability to locate a person, the family had no links or influence in Beirut and it was not satisfied that the appellant’s uncommon name would allow for him to be located.
5. The propositions relied upon by the appellant do not logically support the conclusion that the alleged victim’s family would be able to locate the appellant. Merely because the appellant’s erstwhile village was 2 hours away from Beirut; that his brother commuted that distance; and, that he had an uncommon name does not show or even suggest that he would be located. There is a significant gap in the reasoning of the appellant’s argument in that it omits reference to the facts which link the matters he relied upon to the knowledge the alleged victim’s family will acquire as to his location. The fact that the appellant’s home village is two hours from a part of Beirut does not indicate that his presence in the city will become known. Indeed, it renders it less likely that it would. The mere fact that the appellant’s brother commutes between the two places does not, of itself, heighten that possibility and nor does the fact that the appellant lived at his brother’s place of work or might live near there. The IAA determined that the appellant’s uncommon name would not cause his presence in Beirut to become known.
6. It may be that if there was further information by which the identified factors might permit the victim’s family to connect the appellant to his presence in Beirut, the argument advanced may have more merit. As it is, the IAA identified the absence of any causal nexus and indicated that because the victim’s family did not have links to paramilitary organisations or JN or any influence in Beirut, nothing existed which could satisfy it that the victim’s family would be able to locate the appellant there.
7. In these circumstances, there is a logical and rational pathway in the IAA’s reasoning by which it determined that his alleged victim’s family would not be able to locate the appellant such that it cannot be said that the conclusion reached by the Tribunal that the appellant will not face a real risk of significant harm if he were to relocate to Beirut was unreasonable. In particular, it was within the range of logical or rational conclusions which a reasonable person might reach on the evidence which was before the Tribunal.

## Conclusion

1. It follows that the appeal must be dismissed.

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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 Derrington. |

Associate:

Dated: 22 August 2018