FEDERAL COURT OF AUSTRALIA

BZV18 v Minister for Home Affairs [2019] FCA 1406

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| Appeal from: | *BZV18 v Minister for Home Affairs* [2019] FCCA 982 |
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| File number: | NSD 639 of 2019 |
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| Judge: | **PERRY J** |
|  |  |
| Date of judgment: | 30 August 2019 |
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| Catchwords: | **MIGRATION** – appeal from Federal Circuit Court (FCC) dismissing application for judicial review of a decision by Immigration Assessment Authority (IAA) – where IAA affirmed delegate’s decision refusing to grant the appellants a protection visa – whether IAA’s reasoning was illogical – where Appellants sought to rely upon a ground of appeal not raised before the FCC on the basis of a recent Full Court decision – consideration of principles for grant of leave to raise a new ground of appeal – where Minister may have conducted his case differently if the ground had been raised in the FCC – *FER17 v Minister for Immigration, Citizenship and Multicultural Affairs* [2019] FCAFC 106 distinguished – appeal dismissed |
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| Legislation: | *Migration Act 1958* (Cth) |
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| Cases cited: | *AAM15 v Minister for Immigration and Border Protection* [2015] FCA 804; (2015) 231 FCR 452  *Coulton v Holcombe* (1986) 162 CLR 1  *CQG15 v Minister for Immigration and Border Protection* [2016] FCAFC 146; (2016) 253 FCR 496  *FER17 v Minister for Immigration* [2018] FCCA 3767  *FER17 v Minister for Immigration, Citizenship and Multicultural Affairs* [2019] FCAFC 106  *Han v Minister for Home Affairs* [2019] FCA 331  *Minister for Immigration and Citizenship v SZRKT* [2013] FCA 317; (2013) 212 FCR 99  *Murad v Assistant Minister for Immigration and Border Protection* [2017] FCAFC 73; (2017) 250 FCR 510  *VUAX v Minister for Immigration and Multicultural and Indigenous Affairs* [2004] FCAFC 158; (2004) 238 FCR 588 |
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| Date of hearing: | 21 August 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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| Solicitor for the Appellants: | Mr E Rajadurai |
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| Counsel for the First Respondent: | Mr P M Knowles |
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| Solicitor for the Respondent: | Sparke Helmore |
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| Counsel for the Second Respondent: | The Second Respondent filed a submitting notice |

ORDERS

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|  | | NSD 639 of 2019 |
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| BETWEEN: | BZV18  First Appellant  **BZW18**  Second Appellant  **BZX18 (and another named in the Schedule)**  Third Appellant | |
| AND: | MINISTER FOR HOME AFFAIRS AND ANOTHER  Respondent  **IMMIGRATION ASSESSMENT AUTHORITY**  Second Respondent | |

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| --- | --- |
| JUDGE: | PERRY J |
| DATE OF ORDER: | 30 August 2019 |

THE COURT ORDERS THAT:

1. Leave to amend the notice of appeal to include proposed grounds 3 and 5 is refused.
2. Leave is granted to amend the notice of appeal to include proposed ground 1.
3. The appeal is dismissed.
4. The first, second and third appellants are to pay the costs of the first respondent as agreed or assessed.
5. The name of the first respondent be changed to “Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs”.

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

REASONS FOR JUDGMENT

PERRY J:

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##### INTRODUCTION

1. This is an appeal from a decision of the Federal Circuit Court (the **FCC**) dismissing an application for judicial review of a decision of the Immigration Assessment Authority (the **IAA**) made under Part 7AA of the *Migration Act 1958* (Cth) (the **Act**). By that decision, the IAA affirmed a decision of a delegate of the first respondent, the Minister for Home Affairs (the **Minister**), to refuse to grant the appellants Safe Haven Enterprise (Class XC) (subclass 790) visas (the **safe haven visas**). The appellants had claimed relevantly to fear harm if returned to Sri Lanka on the ground, among other things, that they will be imputed as supporting the Liberation Tigers of Tamil Eelam (the **LTTE**) based on their Tamil ethnicity and family history.
2. The appellants (who were then without legal representation) filed a notice of appeal from the FCC decision which simply stated under “*Grounds of appeal*”, “*[s]ee attached grounds of appeal*” but no grounds of appeal were attached. Subsequently, the appellants engaged a solicitor and sought leave to rely upon a draft amended notice of appeal. While the draft amended notice of appeal initially identified six grounds, at the hearing the appellant’s solicitor explained that grounds 4 and 6 were not pressed. He also explained that:
3. ground 2 was merged with ground 1 which challenges the IAA’s rejection of the first and second appellants’ claim to fear harm by reason of their involvement with the Tamil diaspora on the grounds of illogicality; and
4. grounds 3 and 5 were intended to raise the same issue, namely, whether the IAA fell into jurisdictional error in assessing the appellants’ claims to fear harm on the basis that they were nationals of Sri Lanka, when the appellants were not citizens of Sri Lanka under Sri Lankan domestic law and were therefore stateless.
5. The appellants accepted that the second of these issues was raised for the first time on the appeal but submitted that the Court should grant leave to raise the issue because there was “*a change in the law*” when the Full Court delivered judgment in *FER17 v Minister for Immigration, Citizenship and Multicultural Affairs* [2019] FCAFC 106 (***FER17 (FCAFC)***).
6. As I later explain, the Minister opposed the grant of leave to rely on the proposed amended notice of appeal.
7. Pursuant to orders made at the hearing, on 23 August 2019 the Appellants filed a proposed further amended notice of appeal which set out three grounds of appeal: namely, grounds 1, 3 and 5 which were in identical terms to the proposed grounds 1, 3 and 5 in the draft amended notice of appeal identified at [2] above, save that ground 5 was amended to include the second, third and fourth appellants as well as the first appellant.
8. For the reasons set out below, leave to amend the proposed further amended notice of appeal to include grounds 3 and 5 should be refused. While leave should be granted to include ground 1, the appeal should be dismissed.

##### BACKGROUND

1. Given the narrow nature of the issues raised on the appeal, the background may be shortly summarised. I have also omitted potentially identifying information.

###### The appellants’ claims and the decision of the delegate

1. The appellants are of Tamil ethnicity and Hindu religion. The first and second appellants are the father and mother respectively of the third and fourth appellants. The first and second appellants were born in Sri Lanka and lived there before moving to India while still children. The third and fourth appellants, the daughter and son respectively, were born in India. Both children were minors when the first visa protection application was lodged, although the daughter is now an adult.
2. Initially only the father claimed protection in the safe haven visa application on the following grounds.
3. His father, Mr R, supported the LTTE and was killed by the Sri Lankan Army (**SLA**) in the early 1990s after an altercation in which his friend shot a Muslim SLA soldier. The father said that he feared harm from a “*blood feud*” as a result of this.
4. Once he moved to India, he did not register as a refugee and lived in a Tamil community. He did not have legal status in India and faced deportation. He also participated in pro-Tamil protests in India.
5. Following an interview of the father by the Minister’s delegate, the appellants’ representative informed the delegate that the third and fourth appellants, who were then minors, wished to raise their own protection claims (AB293, 296). Following a request by the delegate, the mother, daughter and son then provided statements outlining their own claims for protection (AB300-312). The claims by the mother, daughter and son relevantly included the claim to fear harm by reason of Mr R’s involvement with the LTTE. The mother also claimed that she had lived illegally in India where she participated in pro-Tamil protests.
6. On 25 August 2017, the delegate refused to grant the visas (AB363). Relevantly, the delegate accepted that Mr R was a LTTE supporter who had been killed in the early 1990s but did not accept that there was an ongoing “*blood feud*” with the family of the army officer who was killed by a friend of Mr R.

###### The IAA decision

1. The matter was referred to the IAA on 30 August 2017 and letters were sent on that date to the appellants advising of the referral (AB406). Enclosed with the letters was the IAA Practice Direction which advised among other things that the appellants could provide a written submission on why they disagree with the delegate’s decision and that new information may be received in the very limited circumstances set out in s 473DD of the Act.
2. The appellants’ representative made a submission by letter dated 20 September 2017 to the IAA. In the submission, the representative submitted among other things that the delegate was wrong in grading the level of participation of the applicant in Tamil diaspora activities abroad to determine the father’s risk factor, and that the father’s participation in Tamil diaspora activities abroad would have an adverse impact on the father and his family members including monitoring, harassment, arrest and detention (AB429). Reliance was also sought to be placed upon new information in the form of a letter postdating the delegate’s decision in support of the father’s claims about Mr R’s LTTE links and death at the hands of the SLA, and the appellants’ claims to fear harm if returned (the **new information**) (AB423 and 426-427).
3. The IAA affirmed the delegate’s decision to refuse to grant the appellants the safe haven visas.
4. Relevantly to the present appeal, the IAA accepted that the appellants resided in India illegally and never registered as refugees (IAA reasons at [23]). The IAA also accepted that:
5. there were exceptional circumstances to justify considering the new information (IAA reasons at [6]);
6. Mr R provided support for the LTTE but was not a member or cadre (IAA reasons at [16] and [20]); and
7. Mr R died at the hands of the SLA in 1992, and his death prompted the first appellant’s family to flee to India (IAA reasons at [20]).
8. However the IAA did not accept that:
9. the mother’s father was involved with the LTTE (IAA reasons at [17]);
10. any of the appellants had any personal or direct association with the LTTE as the father and mother left Sri Lanka as young children and their daughter and son had lived their whole lives in India (IAA reasons at [18]);
11. the father and mother were politically active in India; or
12. the claimed blood feud with Muslims exists (IAA reasons at [25] and [29] respectively).

###### The FCC decision

1. The amended application for judicial review in the FCC contained 11 grounds of review although ultimately grounds 4, 5, 8 and 11 were abandoned (FCC reasons at [5]). I note that ground 5 alleged that the IAA fell into jurisdictional error in failing to address the question whether the father was entitled to return to Sri Lanka. As I later explain, the appellants have sought leave to raise this issue again on the appeal with respect to all of the appellants.
2. The primary judge rejected grounds 1 and 2 of the application for judicial review (which equate to ground 1 of the draft amended notice of appeal):

20. … Grounds 1 and 2 suggest that the Authority’s findings that the applicants’ were not involved in pro-Tamil activities in India, given that they say they were, lacks rational or logical connections and raises jurisdictional error in that the Authority failed to ask the correct questions.

21. In my view, the rejection of the claims was based on a finding that it was not plausible that the applicants would be politically active in India and at the same time be in hiding and seeking to not come to the attention of the authorities due to their illegal status. I am satisfied that the finding was logical and rational and having found that the applicants did not participate in activities at all, this deals completely with the issues raised in grounds 1 and 2 of the grounds of appeal.

1. It suffices to note that the remaining grounds of judicial review were also dismissed by the primary judge. Those findings are not challenged on the appeal.

##### PROPOSED GROUND 1, DRAFT NOTICE OF APPEAL

1. ***Ground 1*** of the draft notice of appeal challenges the findings of the IAA as to the father and mother’s claim that during their time in India, they participated in protest marches for Tamil independence in 2001, 2005 and 2006 and that the father was involved in the organisation Naam Thamilar. Specifically the IAA found with respect to these claims that:

24. … I did not find [the father and mother’s] accounts of this activity convincing. The first applicant states that he never came to the attention of the Indian authorities because there were so many people at the protests. He just went and then went back. He did not want to come to the attention of the police as he was not registered to live in India legally. He provided no detail about his involvement with Naam Thamilar or the association generally. The second applicant claims that she went to these protests with her husband however her account of these protests is vague. When pressed she stated that there were 20 to 25 or 30 to 35 people present and that she just went there and went back and came to no adverse attention.

25. All the applicants have gone to great lengths to describe how they avoided the authorities in India moving from place to place in hiding. I do not find it plausible that the first and second applicants were politically active in India while at the same time being in hiding and trying to protect their family. The applicants have not provided consistent or sufficiently detailed accounts of their activism and I do not accept that they participated in pro-Tamil activity when they lived in India or that they came to the attention of the authorities for any pro-Tamil views.

1. The appellants submitted that the finding that it was not plausible for the appellants to contend both that the father and mother were in hiding and, at the same time, were participating in political protests, was illogical, that no reasons were given for the disbelief of their claims to be involved in Tamil diaspora activities, and that it was “*not the only conclusion possible when illegal stay and participation of Tamil diaspora activities are concerned when they are taken together*” (appellants’ submissions at [11]).
2. As proposed ground 1 was raised before the FCC and I infer that its omission is due to the fact that the appellants were unrepresented when they filed their original notice of appeal, I would grant leave to amend the notice of appeal to include proposed ground 1. However, I would dismiss the appeal insofar as it relates to that ground for the following reasons.
3. It may be accepted that this was not the only possible conclusion open, as the appellants submit, and that another decision-maker may have reached a different conclusion. However, that falls well short of demonstrating illogicality. To establish jurisdictional error based on illogical or irrational findings of fact or reasoning, “*extreme*” illogicality must be demonstrated “*measured against the standard that it is not enough for the question of fact to be one on which reasonable minds may come to different conclusions*” (*Minister for Immigration and Citizenship v SZRKT* [2013] FCA 317; (2013) 212 FCR 99 at [148]; *CQG15 v Minister for Immigration and Border Protection* [2016] FCAFC 146; (2016) 253 FCR 496 (***CQG15***) at [60] (the Court)). Thus, “*[e]ven emphatic disagreement with the Tribunal’s reasoning would not be sufficient to make out illogicality*”: *CQG15* at [61]. Applying these principles, no illogicality in law is demonstrated here. Rather, having accepted that the appellants did not have lawful permission to remain in India and their attempts therefore to avoid attracting the attention of the Indian authorities, it was open to the IAA to find the claim by the father and mother to have participated nonetheless in political protests in India to be implausible. Equally, it was open to the IAA to rely upon this finding as one of the factors which led it to disbelieve the claims by the father and mother to have engaged in political activities. It follows that no error is shown in the primary judge’s rejection of grounds 1 and 2 of the application for judicial review.

##### PROPOSED GROUNDS 3 AND 5, DRAFT NOTICE OF APPEAL

###### The issues raised by the proposed grounds and disposition of ground 3

1. At the heart of proposed ground 5 is the contention that the IAA erred in a jurisdictional sense by not finding that the appellants were stateless and unable to return to Sri Lanka. I also note that the Minister initially opposed the grant of leave to include ground 5 on the basis that “*the Appellants’ submissions in respect of ground five do not reflect the ground itself. The ground is framed by reference to the First Appellant’s entitlement to return to Sri Lanka; the Appellants’ submissions address the nationality of the First, Third and Fourth Appellants*” (Minister’s submissions at [35]). However, at the hearing the Minister explained that he did not press this objection as the appellants’ arguments had sufficiently elucidated the proposed basis for the challenge. I deal later with the other objections raised by the Minister to this ground.
2. The appellants’ solicitor also submitted at the hearing that ground 3 was directed to the same issue as ground 5. However, the pleading in ground 3 is concerned with a different topic, as is apparent from the particulars to the ground which state that “*Authority failed to deal with the claim of the Applicant that he will be targeted by the Muslims, in the present context of Sri Lanka in that Applicant’s father was killed in 1992 and Applicant will be imputed with LTTE profile as family member*” (quoted without alteration). As the appellant made no arguments in support of ground 3 as actually pleaded, I refuse leave to amend to include ground 3.
3. The appellants accept that proposed ground 5 was abandoned in the FCC but submitted that they wish to raise the issue now in light of the decision in *FER17 (FCAFC)* which was delivered on 24 June 2019. As such, it is necessary first to consider the principles by which it is determined whether leave to raise the new issue should be granted, before considering how those principles should apply in the present case.

###### Relevant principles where it is sought to raise a ground on appeal which was not run at trial

1. Leave to raise a ground on appeal not raised before the primary judge should be allowed only if it is expedient in the interests of justice to do so (*VUAX v Minister for Immigration and Multicultural and Indigenous Affairs* [2004] FCAFC 158; (2004) 238 FCR 588 (***VUAX***) at [46]). Factors relevant to an assessment of where the interests of justice lie were conveniently discussed by Bromwich J in the recent decision in *Han v Minister for Home Affairs* [2019] FCA 331 at [8]-[18] (***Han***) and may be conveniently summarised as follows.
2. The starting point established by long-standing High Court authority is that “*[a]ppeals, even appeals by way of rehearing such as this appeal, are not to be relegated to the role of only providing an opportunity to conduct a second trial upon a different basis, the first trial having failed*” (*Han* at [10]). As the High Court observed in *Coulton v Holcombe* (1986) 162 CLR 1 (***Coulton***) at 8 (Gibbs CJ, Wilson, Brennan and Dawson JJ), proceedings at first instance should not be reduced “*to little more than a preliminary skirmish. The powers of an appellate court with respect to amendment are ordinarily to be exercised within the general framework of the issues so determined and not otherwise.*” As Bromwich J observed in *Han* at [18], these principles “*should apply with even greater force and effect when it is not just an argument, issue, or even substantial change in the pleading that is new, but where the very basis upon which the case was brought in the court below has changed.*”
3. Added to this, where the appellate court becomes in effect the court at first instance, the structure established by Part 8 of the Migration Act “*is thwarted because no appeal lies to the High Court other than by special leave which is rarely granted and then only on the grounds set out in s 35A of the Judiciary Act 1903 (Cth). If the matter is effectively tried in this Court then the appellant is denied a layer of appellate scrutiny*”: *AAM15 v Minister for Immigration and Border Protection* [2015] FCA 804; (2015) 231 FCR 452 at [14] (Perram J) (quoted with approval by the Full Court in *BZD17 v Minister for Immigration and Border Protection* [2018] FCAFC 94; (2018) 263 FCR 292 at [28]).
4. That the proposed ground has merit is necessary to grant leave to advance an entirely new proposed ground of review on appeal, but is not of itself ordinarily sufficient (*Han* at [8]). As the Full Court explained in *VUAX* with particular reference to migration appeals:

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

Thus, reliance upon merit “*becomes more problematic when there is no adequate explanation for the ground not having been advanced at the trial in the court below and other circumstances also tell against leave being granted*” (*Han* at [9]).

1. Where the respondent would be prejudiced by permitting the new ground to be raised in that, if it had been raised below, the respondent may have led evidence or conducted her or his case differently, the amendment should be refused. On the other hand, as the Full Court observed in *Murad v Assistant Minister for Immigration and Border Protection* [2017] FCAFC 73; (2017) 250 FCR 510 at [20], “*generally speaking, leave is more likely to be granted to permit a fresh issue to be raised on appeal where the new point turns only upon a question of construction or upon a point of law, or where the facts are not in controversy*” (citing *Summers v Repatriation Commission* [2015] FCAFC 36; (2015) 230 FCR 179 at [94]).

###### Leave to amend to include ground 5 insofar as it relates to the daughter and son

The decisions in *FER17 (FCC)* and *FER17 (FCAFC)*

1. It is helpful first to consider the decision in *FER17 (FCAFC)* which the appellants submit effected a change in the law justifying the grant of leave to raise the new grounds *vis a vis* the daughter and son. The submissions in support of these grounds insofar as they apply to the parents do not rely upon the decision in *FER17 (FCAFC)* and I therefore deal with them separately.
2. The decision in *FER17 (FCAFC)* was an appeal from the decision of the FCC in *FER17 v Minister for Immigration* [2018] FCCA 3767 (***FER17 (FCC)***). The appellant in that case was not born in Sri Lanka although his parents had been. He had claimed before the IAA that he was stateless and that he had no documents stating that he was a citizen of Sri Lanka (*FER17 (FCC)* at [5] and [12]-[13]). The IAA considered country information indicating that children born outside Sri Lanka to Sri Lankan parents are entitled to Sri Lankan citizenship and that the child’s citizenship could be confirmed by registering the birth within one year, or could be obtained subsequently by lodging the relevant documents on payment of a “*fine*” (or, probably more accurately, a fee) (*FER17 (FCC)* at [14] and [29]). While the IAA accepted that the appellant’s birth may not have been registered with the Sri Lankan government, it was satisfied on the documentary evidence available to the appellant that his birth could be registered and Sri Lankan citizenship “*conferred*” (*FER17 (FCC)* at [15]-[16]).
3. In *FER17 (FCC)*, the primary judge held that the IAA had fallen into jurisdictional error by proceeding on the basis that the appellant was therefore a Sri Lankan national and that Sri Lanka was his “*receiving country*” for the purposes of its review under the Act. Specifically, Young J held that:
4. the IAA had misconstrued the law of Sri Lanka when it had concluded that FER17 was a national of Sri Lanka and that Sri Lanka was his receiving country for the purpose of its review because under Sri Lankan law “*[a]t most he has an entitlement to citizenship should he apply to register his birth in the prescribed manner and to seek an extension of time in which to do so, should the Minister for good cause allow*” (at [32]);
5. as the IAA’s error was material to the conclusions that it reached with respect to the appellant’s protection claims, the error was jurisdictional in nature (at [46]);
6. however, relief was denied in the exercise of discretion.
7. The Full Court dismissed the Minister’s cross-appeal against the first two of these findings and allowed the appeal against the third. Relevantly, the Full Court held that:

78. Once it is accepted that the meaning of “a national” and “nationality” for the relevant purposes of the Act, properly construed, does not extend to a person who is not presently a national of another country (understood in its ordinary sense) but who might have, or has, the capacity to acquire that other country’s citizenship, it is clear that the Minister’s cross-appeal cannot succeed.

1. The Full Court agreed with the FCC that the error was jurisdictional but found that there was no reason to deny the grant of relief in the exercise of discretion.

Leave to amend to include ground 5 insofar as it relates to the daughter and son must be refused

1. The third and fourth appellants submit that they are in exactly the same position as the appellant in *FER17 (FCC)* because their parents were Sri Lankan but they were born outside Sri Lanka as the IAA found. They also submit that although this claim was not raised before the IAA, the Full Court’s decision represented a change in the law which post-dated the IAA’s decision. As such, they argue that they should not be deprived of the benefit of the Full Court’s decision given in particular the seriousness of the consequences to them if the IAA’s decision is upheld and they are returned to Sri Lanka. They accepted, however, that they had not claimed to be stateless before the IAA.
2. In my view, those submissions should not be accepted and the application for leave to amend to include proposed ground 5, refused.
3. First, as earlier explained, ground 5 raises a new issue which had been abandoned at trial.
4. Secondly, as the appellants submit, the decision in *FER17 (FCC)* which was delivered on 20 December 2018 post-dated the IAA’s decision which was notified on 5 April 2018 (AB433). However, the decision in *FER17 (FCC)* was delivered before the hearing in the FCC in this matter on 11 April 2019. Given that the Full Court upheld the decision of *FER17 (FCC)* in those respects which are relevant to the present appeal, the fact that the Full Court’s decision in *FER17 (FCAFC)* was delivered on 24 June 2019 and therefore after the FCC decision here does not explain why the appellants did not raise the issue in the FCC. In this regard, I note that the appellants had legal representation in the FCC. As such, no adequate explanation has been given for the failure by the appellants to raise the issue in the FCC.
5. Thirdly, I do not consider that the ground insofar as it concerns the third and fourth appellants has any real merit. In contrast to *FER17 (FCAFC)*, in the present case the daughter and son did not claim to be stateless. While they did not answer the question in the visa application form asking them to state their citizenship, they asked for their claims also to be assessed against Sri Lanka as the receiving country and there was nothing in the material before the IAA to alert it to any claim of statelessness.
6. Fourthly, there is a real possibility that the Minister may have conducted his case differently in the FCC if ground 5 had been pressed in the FCC. In this regard, while proof of foreign law is itself a question of fact, the Minister’s counsel accepted for the purposes of the appeal that Sri Lankan law was as stated in s 5(2) of the *Citizenship Act 1948* (Sri Lanka) (the **Sri Lankan Citizenship Act**)upon which the IAA had relied in *FER17*, namely:

Subject to the other provisions of this Part, a person born outside Sri Lanka on or after the appointed date shall have the status of a citizen of Sri Lanka if at the time of his birth either of his parents is or was a citizen of Sri Lanka and if, within one year from the date of birth, or within such further period as the Minister may for good cause allow, the birth is registered in the prescribed manner:

(a) at the office of a consular officer of Sri Lanka in the country of birth; or

(b) at the office of the Minister in Sri Lanka.

(As quoted in *FER17 (FCC)* at [21])

1. Nonetheless, the Minister submitted that proposed ground 5, insofar as it related to the daughter and son, would still have raised factual questions “*of whether or not their births were registered and at what point in time and what the consequence of registration may have been if it occurred by reason of section 5(2) of the Sri Lankan Citizenship Act*”. In other words, the Minister submitted that ground 5 could not be determined without further evidence as to how s 5(2) of the Sri Lankan Citizenship Act applied to the daughter and son. Accordingly, if the issue had been raised below, the Minister submitted that he may have run his case differently. Specifically, counsel for the Minister submitted that:

MR KNOWLES: … it’s not entirely theoretical that even if this had – claim had been run in the Federal Circuit Court, there would be a question of whether there’s sufficient factual foundation to establish error on the part of the Authority, but even if it had been, one might imagine enquiries being made or questions being asked in the court below as to whether the birth had been registered, or whether the birth of the children were registered within a particular time. That’s ‑ ‑ ‑

HER HONOUR: In cross-examination, you mean.

MR KNOWLES: Yes.

HER HONOUR: By the Minister. That he would explore these questions – might explore these questions.

MR KNOWLES: I’ve raised it – I don’t – I can’t put it higher than a possibility is that the Minister may have put on evidence but it wouldn’t normally be the Minister’s practice in the case of refugee applicants to make approaches of foreign country’s governments and ask questions about applicants claiming to fear persecution.

1. In this regard, as the High Court said in *Coulton* at 7-8, “*[i]n a case where, had the issue been raised in the court below, evidence could have been given which* ***by any possibility*** *could have prevented the point from succeeding, this Court has firmly maintained the principle that the point* ***cannot*** *be taken afterwards* *…*” (emphasis added).

###### Leave to amend to include ground 5 insofar as it relates to the father and mother

1. As the father and mother were born in Sri Lanka, the appellants’ argument with respect to proposed ground 5 as it applied to them did not rely upon the decision in *FER17 (FCAFC)*. Rather, the appellants submitted that a question arose as to whether the father is a Sri Lankan citizen because his parents were identified in his birth certificate as Indian Tamils, giving rise to a question as to whether the father had invoked his right to citizenship after the enactment of a Sri Lankan law in 2003. The appellants submit that “*[a]pplying these circumstances and arguments to [the mother]*”, the mother “*may be deemed to have renounced her Sri Lankan citizenship*” (appellants’ submissions at [36]). The appellants accepted that these issues had not been raised before the IAA.
2. Leave to amend to include ground 5 insofar as it relates to the first and second appellants (the father and mother) must also be refused.
3. First, ground 5 was also abandoned in the FCC insofar as it applied to the mother and father.
4. Secondly, no explanation has been given as to why the issue was not pressed in the FCC.
5. Thirdly, it cannot be said that the IAA erred in not considering this issue as it was not raised by the appellants. To the contrary, the first and second appellants stated that they had held Sri Lankan citizenship in their visa application forms and, while they left blank the box in the visa application form which inquired as to their current citizenship, they did not indicate that anything had occurred which might have resulted in the loss of Sri Lankan citizenship. Furthermore, the claims made by the first and second appellants, in common with the claims made with respect to their children, were directed towards the delegate and the IAA assessing their claims against Sri Lanka as the receiving country.
6. Finally, the ground would not raise merely legal issues but also questions of fact. Importantly, I accept that there is a real possibility that the Minister may have conducted his case differently in the FCC if ground 5 had been pressed in the FCC as against the father and mother. In this regard, the Minister submitted that issues as to the content of Sri Lankan law may well have required exploration, as well as how that law may have applied in the particular circumstances of the father and mother.

##### CONCLUSION

1. It follows for these reasons that I refuse leave to amend the notice of appeal to include proposed grounds 3 and 5 but would allow the application for leave to amend the notice of appeal to include ground 1. The appeal should be dismissed with costs.

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| I certify that the preceding forty-seven (47) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Perry. |

Associate:

Dated: 30 August 2019

SCHEDULE OF PARTIES

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|  |  |
| Appellants |  |
| Fourth Appellant | BZY18 |