FEDERAL COURT OF AUSTRALIA

DMU16 v Minister for Immigration and Border Protection [2018] FCA 1334

|  |  |
| --- | --- |
| Appeal from: | *DMU16 v Minister for Immigration & Anor* [2018] FCCA 276 |
|  |  |
| File number: | NSD 327 of 2018 |
|  |  |
| Judge: | **THAWLEY J** |
|  |  |
| Date of judgment: | 3 September 2018 |
|  |  |
| Catchwords: | **MIGRATION –** appeal from Federal Circuit Court of Australia – where Federal Circuit Court dismissed an application for review of a decision of the Immigration Assessment Authority – whether Authority was required to engage in “more specific reasoning” in relation to threats purportedly made to the appellant – whether Authority failed to engage in an “active intellectual process” in relation to each integer of the appellant’s claims  **PRACTICE AND PROCEDURE –** application for leave to rely on grounds not raised below –whether in the interests of justice to grant leave – where grounds had no real merit – leave refused |
|  |  |
| Cases cited: | *ADF15 v Minister for Immigration and Border Protection* [2018] FCA 1099  *Minister for Immigration and Citizenship v SZIAI* (2009) 83 ALJR 1123  *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259  *MZAGE v Minister for Immigration and Border Protection* [2016] FCA 630  *NABE**v Minister for Immigration and Multicultural and Indigenous Affairs* (2004) 144 FCR 1  *NAJT v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 147 FCR 51  *SZVLE v Minister for Immigration and Border Protection* [2017] FCA 90  *VUAX v Minister for Immigration and Multicultural and Indigenous Affairs* (2004) 238 FCR 588 |
|  |  |
| Date of hearing: | 7 August 2018 |
|  |  |
| Registry: | New South Wales |
|  |  |
| Division: | General Division |
|  |  |
| National Practice Area: | Administrative and Constitutional Law and Human Rights |
|  |  |
| Category: | Catchwords |
|  |  |
| Number of paragraphs: | 40 |
|  |  |
| Counsel for the Appellant: | The Appellant appeared in person |
|  |  |
| Counsel for the Respondents: | Ms R Francois |
|  |  |
| Solicitor for the Respondents: | Australian Government Solicitor |

ORDERS

|  |  |  |
| --- | --- | --- |
|  | | NSD 327 of 2018 |
|  | | |
| BETWEEN: | DMU16  Appellant | |
| AND: | MINISTER FOR IMMIGRATION AND BORDER PROTECTION  First Respondent  IMMIGRATION ASSESSMENT AUTHORITY  Second Respondent | |

|  |  |
| --- | --- |
| JUDGE: | THAWLEY J |
| DATE OF ORDER: | 3 SEPTEMBER 2018 |

THE COURT ORDERS THAT:

1. The appeal be dismissed.
2. The appellant pay the first respondent’s costs as agreed or assessed.

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

REASONS FOR JUDGMENT

THAWLEY J:

1. This is an appeal from orders of the **Federal Circuit Court** of Australia made on 21 February 2018, dismissing an application for judicial review of a decision of the Immigration Assessment **Authority** made on 26 October 2016, affirming a decision of the delegate of the first respondent (**Minister**) made on 30 August 2016 not to grant the appellant a protection visa, being a Safe Haven Enterprise (Class XE) (subclass 790) visa (**SHEV**).

# Adjournment application

1. At the hearing of the appeal, the appellant applied for an adjournment. The relevant factual background was:
2. The appellant was represented by counsel before the Federal Circuit Court, which delivered judgment on 21 February 2018.
3. The appellant electronically lodged his notice of appeal on 8 March 2018. He was provided assistance in the preparation of that document.
4. The appellant was informed by email from the Court sent on 18 April 2018 of orders which had been made for the conduct of the appeal. Although not mentioned by the appellant, this email stated that, in the ordinary course, the matter should be listed in the 6 to 31 August 2018 sitting period.
5. The appellant was informed by email from the Court sent on 13 July 2018 that the hearing was listed for 7 August 2018.
6. The appellant did not file written submissions 10 business days before the hearing in accordance with the orders made on 18 April 2018. The appellant received the Minister’s written submission on 31 July 2018 or 1 August 2018.
7. On the afternoon of Friday, 3 August 2018, the appellant sent an email stating that he “was only notified of the listing” of the appeal on 13 July 2018 and stating that he wished to secure a barrister to appear for him. The appellant stated that he would ask for an adjournment at the hearing on 7 August 2018.
8. At the hearing of the appeal, the appellant did not give evidence of, or state that he had taken, any steps to secure legal representation for a hearing in August 2018, be that after he instituted the appeal, after the email from the Court on 18 April 2018 or after the email from the Court on 13 July 2018.
9. The appellant stated he had not been able to save a sufficient amount of money to afford legal representation since he filed his appeal, some five months ago.
10. The appellant requested a three month adjournment.
11. The appellant made some statements as to his earnings and noted that he had private expenses, but did not give information sufficient to justify a conclusion that he would be able to pay for legal representation if a three month adjournment were granted.
12. The discretionary power to grant an adjournment is to be exercised judicially taking into account all relevant matters including the proper administration of justice.
13. There is no absolute entitlement in a party to be legally represented before the Court: *SZVLE v Minister for Immigration and Border Protection* [2017] FCA 90 at [40] (Katzmann J); *ADF15 v Minister for Immigration and Border Protection* [2018] FCA 1099 at [25] (Flick J). Nevertheless, the fact that a party wishes to obtain legal representation is a relevant factor in considering the question of whether an adjournment should be granted.
14. The application for an adjournment was refused for the following reasons:
15. The appellant engaged the appellate jurisdiction of this Court in March 2018 and was informed in April 2018 that his appeal was likely to be heard in August 2018. It is in this context that the email sent on 13 July 2018 identifying the exact date and time of the appeal must be seen.
16. The appellant did not take sufficient steps to secure legal representation at the appropriate time, namely after the filing of the notice of appeal and by August 2018.
17. The appellant did not provide information sufficient for a conclusion to be drawn that he was likely to be able to obtain or afford representation if a three month adjournment were granted.
18. The grounds advanced in the notice of appeal indicate that the drafter had some knowledge of migration matters and could have been a lawyer and, to that extent, the appellant has had the benefit of some assistance.
19. It did not appear from a review of the decisions of the Authority and the Federal Circuit Court, and the grounds of appeal set out in the notice of appeal to this Court, that the appellant would be unfairly disadvantaged by the lack of legal representation. The grounds of appeal appeared weak, but it did not appear that they could be improved.
20. The appellant has experienced difficult circumstances and was unrepresented and not legally trained. This Court is cognisant of those difficulties and approaches the hearing of appeals in these circumstances in a way conducive to ensuring appellants are properly heard and that they are not unfairly disadvantaged by their difficult situation – see: *MZAGE v Minister for Immigration and Border Protection* [2016] FCA 630 at [32] (Mortimer J).

# Background

1. The appellant, a Sri Lankan national, arrived at the Cocos (Keeling) Islands by boat on 25 September 2012. He participated in an “entry interview” on 11 January 2013. By his agent, he applied for a protection (Class XA) visa on 7 September 2013.
2. The appellant was informed by letter dated 10 October 2014 that his application was invalid because of a statutory bar. On 30 November 2015, the Department wrote to the appellant informing him that the statutory bar had been lifted and inviting him to apply for a temporary protection visa or a Safe Haven Enterprise Visa (**SHEV**).
3. The appellant applied for the SHEV on 19 February 2016. The appellant provided additional material in respect of his application on 8 April 2016 and was interviewed on 8 June 2016 and 14 July 2016.
4. The appellant’s statutory declaration which outlined his claims included the following:

10. It was only about 15 days later, also during September 2011, that at about 10:00pm at night, I received a telephone call from an individual who did not identify themselves but I assumed was a [member of the Criminal Investigations Department (**CID**) of the Sri Lanka Police]. The individual again accused me of providing vegetables to the [Liberation Tigers of Tamil Eelam (**LTTE**)] in support of the LTTE. The individual said words to the effect of “You helped the LTTE in this way so you must have assisted them in other ways. How could you have not joined the LTTE, given you were from an LTTE area?” I responded that due to my speech impediment the LTTE did not force me to join. I also responded similarly to the previous occasion – namely, I made clear to this man that our area had been predominantly an LTTE area in the past and so if we had sold vegetables or crops to individuals who belonged to the LTTE, it was only because there were so many LTTE individuals in our area, not an act in support of the LTTE. I also made clear to this man on the telephone that the LTTE individuals paid for these goods, albeit at a lower price than others (due to their threats of violence if we did not listen). We had never voluntarily assisted the LTTE nor assisted them without a fee. The CID member also demanded that I provide him with money but I told him I had no money.

11. For about the next three months, I would persistently received telephone calls of intimidation and false accusations such as this one. I became increasingly fearful of what may eventuate.

12. In about March 2012, while I was at my [Town B] address and my mother was at [Town A], two armed individuals arrived at our [Town A] address on a motorbike. My mother went outside to see what they needed. The individuals enquired of my whereabouts but my mother did not give them any information apart that I had gone out. The very next day, I was at our [Town A] home and at this point my mother told me about her encounter with these men. These men were in civilian dress but we knew they were members of the CID. They had told my mother words to the effect of “We have called your son many times. He does not answer our calls. Tell him to answer the phone or else we will shoot him.” When I learnt of this information, I knew it was unsafe to remain at this residence so I returned to [Town B] but I stayed with my aunty [Y]. I would also stay at my aunty [X’s] house when I was in [Town A], in order to evade danger. Sometimes I would return to our family homes. I did this until the time I fled Sri Lanka in September that year.

13. In about August 2012, I was at my aunty [Y’s] home in [Town B] one day when two CID members (who I believe must be the same two I had previously encountered in September 2011) arrived at my home in [Town A] and demanded my mother tell them my whereabouts. My mother lied and told them I was out watching a movie with my friends. They did not believe her and demanded to search the house. They entered our home and searched the premises thoroughly for me. They eventually left with words to the effect of “We already told you he has not been answering our calls. Next time he does not answer - we will shoot him!”

1. The Minister, by his delegate, made the decision to refuse the grant of a SHEV on 30 August 2016.

# THE AUTHORITY

1. On 2 September 2016, the Authority wrote to the appellant indicating that the Minister’s decision had been referred to it for review. The appellant’s agent provided a written submission and other material to the Authority on 11 September 2016.
2. In the written statement of the decision, which included its reasons, the Authority referred to the threats which had been made that the appellant would be shot. It stated at A[34] and A[35]:

34. The applicant claimed that in March 2012 two armed CID members visited the applicant’s home when he was away. They told his mother that the applicant does not answer his phone and if he did not answer their calls they would shoot him. He clarified at the interview that he answered the first few phone calls and then when he received a call from a private number he did not answer it.

35. The applicant claimed In [sic] August 2012 his mother received another visit from two CID members. They told her they would shoot the applicant if he did not answer their phone calls. After he departed Sri Lanka in September 2012, sometime in October 2012 the CID went to the applicant’s father’s home and asked his father about the applicant’s whereabouts.

1. It accepted that those threats had been made: A[36]. The Authority then referred to independent country information from A[37] to A[41] and made various findings and reached various conclusions from A[42] to A[46]:

42. After assessing all the evidence I accept that in 2011 and 2012 men from the CID visited the applicant’s home on three occasions; that the applicant was at home on one occasion when they visited in 2011 and not at home on the other two occasions when they visited in 2012. I accept that the applicant was questioned about the LTTE by the CID during their visit in 2011 and I accept that threats were made against the applicant during the 2012 visits. I accept that the applicant was required to provide his phone number to the men from the CID and that they subsequently phoned him as claimed. I note the country information reports which indicate that if the applicant was thought to have been a member of the LTTE or associated with the LTTE in any way, other than by virtue of the fact that he lived in LTTE controlled territory and as such supplied the LTTE with vegetables, he would have been arrested and sent to a rehabilitation centre or prosecuted through the courts or detained, questioned and released. The applicant does not claim that these things happened to him.

43. I note that the applicant continued to live in the homes of his father, his mother and his aunts in the Batticaloa district throughout 2011 and 2012 until his departure from Sri Lanka. In addition, the applicant continued to work on the family farm and the family cultivated land. I note the applicant’s claim that he took different paths when travelling to work and home, however in my view, it is reasonable to assume, that if the Sri Lankan authorities, including the CID, suspected the applicant of involvement with the LTTE or any militant separatist group, either in the past or at the time of their visits, they would have located the applicant, detained and questioned him. This did not happen.

44. I accept the applicant’s claim that he was asked by the person who phoned him to pay money on at least one occasion. However I note the applicant’s statements that he told them he did not have any money; that he did not ever give them any money; that if he had paid he would have faced a problem.

45. At the SHEV interview the applicant clarified that the last time the CID visited his family was in October 2012. He believes they stopped visiting as they learnt he had travelled to Australia. The applicant clarified that his parents and siblings continue to live at the family homes in [Town A] and [Town B] and have had no problems with the Sri Lankan authorities in the past four or five years or at any time prior to that.

46. I am satisfied, on the evidence, that the phone calls, requests for money, and visits to the applicant’s home by the CID amounts to monitoring and harassment of the applicant however I find that this treatment does not amount to serious harm. I am also satisfied that the phone calls, requests for money, and visits to the applicant’s home by the CID in 2011 and 2012 do not, of themselves, lead to a real chance of serious harm to the applicant in the reasonably foreseeable future in Sri Lanka.

1. The Authority adopted its findings in respect of the refugee criterion when considering the complementary protection criterion: A[69].
2. The Authority affirmed the delegate’s decision on 26 October 2016, concluding that neither the refugee criterion nor the complementary protection criterion had been made out.

# Federal Circuit Court

1. Before the Federal Circuit Court there was only one ground:

The Assessor erred in failing to consider an integral part of the Applicant’s claim.

1. This was supported by twenty particulars. However, at the hearing the appellant’s counsel only pressed one particular:

(xx) The Assessor did not consider the threats to shoot the Applicant in reaching the decision that the treatment of the Applicant does not amount to serious harm or lead to a real chance of serious harm.

1. The submissions to the Federal Circuit Court made by counsel were summarised in the Federal Circuit Court reasons at J[20] (citations omitted):

20. The applicant makes the following contentions based upon the facts as accepted by the Authority:

a) the irresistible inference is that the applicant left Sri Lanka as a consequence of the threats made to his life, that the steps he took after March 2012 were precipitated by the threat then made and that his departure from Sri Lanka was precipitated by the second threat made in August 2012;

b) it was an essential integer of the applicant’s claim that he fears persecution that he was threatened on two occasions to be shot by the CID;

c) the Authority was obliged to consider each integer of the applicant’s claim. Consideration involves engaging in an “active intellectual process” directed at the integer of the claim;

d) in relation to the threats, the Authority stated that it “accept[s] that threats were made against the applicant during the 2012 visits”;

e) the Authority expressed its conclusion that “the phone calls, requests for money, and visits to the applicant’s home by the CID amounts to monitoring and harassment of the applicant” but “this treatment does not amount to serious harm” or “lead to a real chance of serious harm to the applicant in the reasonably foreseeable future”;

f) apart from the reference above, the Authority did not refer to the threats as part of, or in the process of reaching, its conclusion;

g) there is nothing to suggest that the Authority had regard to the character of the threats made;

h) the reasons for decision contain no discussion of the fact that the threats were that the applicant would be shot, not for example, that he would be arrested or beaten;

i) there is nothing to suggest that the Authority gave any consideration to the prospect of the threats being carried out, whether at the time they were made or if the applicant were to return to Sri Lanka. For example, the reasons for decision do not disclose any consideration of whether the threats were serious or merely empty threats which were only intended to scare the applicant. Nor, for example, do they disclose any consideration of whether the incidents reflect the antagonism of the CID generally or only of particular individuals; and

j) by failing to deal with these matters, the Authority failed to properly consider this significant element of the applicant’s claim.

1. The Federal Circuit Court rejected the argument that the Authority was required to engage in “more specific reasoning”: at J[26].
2. The Federal Circuit Court stated at J[21] to J[23] (citations omitted, emphasis in original):

21. I prefer the Minister’s submissions which are, essentially, that the Authority did all it needed to do in order to dispose of the applicant’s claims **as they were put**.

22. By way of background to the threats, it is important to note that the threats were only:

a) made on a contingent basis to his family as follows: “[w]e have called your son many times. He does not answer our calls. Tell him to answer the phone or else we will shoot him”; and

b) in the context of earlier phone calls to the applicant which had only two purposes; namely to further interrogate the applicant about his possible LTTE links and/or to extract money.

23. The applicant does not appear to dispute that the Authority expressly referred to and understood that the 2012 visits to his home included these contingent threats to shoot the applicant if he did not answer the phone, as the Authority referred expressly to the threats on four occasions in its decision.

1. The Federal Circuit Court then stated (at J[24] and J[25]) (citations omitted, emphasis in original):

24. The Authority’s reasons make clear that the manner in which it addressed the question of whether the applicant had a *well-founded* fear of harm arising from these incidents during the home visits in 2012 was to:

a) First,review the country information which concluded that “Tamil civilians who were not members of the LTTE, including those who may have provided a low-level of support to the LTTE, may be monitored by Sri Lankan authorities, but are at low risk of being detained or prosecuted”;

b) then,consider the actual incidents in the context of that information, noting that the Authority specifically referred to the “threats” being made during what it described as the CID “visits” in 2012; and

c) finally,to expressly consider the applicant’s conduct with respect to the demands for money.

25. It was in this context, of having encapsulating the threats as part of the visits at [42], that the Tribunal made the following key findings:

I note that the applicant continued to live in the homes of his father, his mother and his aunts in the Batticaloa district throughout 2011 and 2012 until his departure from Sri Lanka. In addition, the applicant continued to work on the family farm and the family cultivated land. I note the applicant’s claim that he took different paths when travelling to work and home, however in my view, it is reasonable to assume, that if the Sri Lankan authorities, including the CID, suspected the applicant of involvement with the LTTE or any militant separatist group, either in the past or at the time of their visits, they would have located the applicant, detained and questioned him. This did not happen.

I accept the applicant’s claim that he was asked by the person who phoned him to pay money on at least one occasion. However I note the applicant’s statements that he told them he did not have any money; that he did not ever give them any money; that if he had paid he would have faced a problem.

At the SHEV interview the applicant clarified that the last time the CID visited his family was in October 2012. He believes they stopped visiting as they learnt he had travelled to Australia. The applicant clarified that his parents and siblings continue to live at the family homes in … and have had no problems with the Sri Lankan authorities in the past four or five years or at any time prior to that.

I am satisfied, on the evidence, that the phone calls, requests for money, and visits to the applicant’s home by the CID amounts to monitoring and harassment of the applicant however I find that this treatment does not amount to serious harm. I am also satisfied that the phone calls, requests for money, and visits to the applicant’s home by the CID in 2011 and 2012 do not, of themselves, lead to a real chance of serious harm to the applicant in the reasonably foreseeable future in Sri Lanka.

1. The Federal Circuit Court correctly concluded that the Authority did not err in a manner which went to jurisdiction in the way in which, or the detail with which, it reasoned. It concluded (at J[29]):

I am satisfied that the Authority’s decision dealt adequately with the applicant’s asserted fear of harm based upon his past association with the LTTE. The Authority reasoned that if the applicant was really suspected of having LTTE links, he would have been arrested, and that the home visits and phone calls amounted to monitoring and harassment. Beyond that, it may be inferred from the facts accepted by the Authority, and from its reasons, that the applicant was a victim of attempted extortion by CID operatives abusing their authority. It may well be that the applicant genuinely feared harm because of those extortion attempts and left Sri Lanka in order to avoid them. However, the applicant did not claim protection from criminal extortionists. He claimed protection on the basis that he feared harm by reason of his past association with the LTTE. The Authority dealt with that claim.

1. At J[30], the Federal Circuit Court stated:

It may be that the Authority should have done more to explore the issue of the extortion attempts in the context of complementary protection. No challenge was made in these proceedings, however, in respect of that aspect of the Authority’s decision.

# Grounds of Appeal

1. There were six grounds of appeal, only the first two of which may be seen as having been advanced before the Federal Circuit Court:
2. First, it was said that the Federal Circuit Court erred in not holding that the Authority was “required to engage in more specific reasoning” in relation to threats which had been made to the appellant by the CID when it attended the appellant’s home.
3. Secondly, it was said that the Authority was required, but failed, to engage in an “active intellectual process” in relation to each integer of the appellant’s claims.
4. Thirdly, it was said that the Authority “should have done more to explore the issue of the applicant’s claim of extortion attempts in the context of complementary protection” and the Federal Circuit Court should have so held.
5. Fourthly, it was said that the Federal Circuit Court erred in holding that the Authority’s decision dealt adequately with the appellant’s asserted fear of harm because of past links to the LTTE and that the Authority did not apply the real chance test as explained in *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259.
6. Fifthly, it was said that there was jurisdictional error in failing to hold that the harm the appellant would face if he were returned to Sri Lanka was due to his actual or imputed political opinion as a supporter of LTTE and was “motivated and deliberate conduct of his persecutors and it amounts to systematic discriminative conduct”.
7. Sixthly, it was claimed that the Authority did not properly address and deal with the likelihood of pre-trial detention if the appellant were to return to Sri Lanka in considering the appellant’s claim for a protection visa on the complementary protection ground.

# consideration

## Leave to raise new grounds

1. Leave to raise new arguments on appeal may be granted where it is in the interests of justice to do so: *VUAX v Minister for Immigration and Multicultural and Indigenous Affairs* (2004) 238 FCR 588 at 598 to 599. Considerations relevant to the exercise of the discretion were identified by Madgwick J in *NAJT v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 147 FCR 51 at [166] as including:

1) Do the new legal arguments have a reasonable prospect of success?

2) Is there an acceptable explanation of why they were not raised below?

3) How much dislocation to the court and efficient use of judicial sitting time is really involved?

4) What is at stake in the case for the appellant?

5) Will the resolution of the issues raised have any importance beyond the case at hand?

6) Is there any actual prejudice, not viewing the notion of prejudice narrowly, to the respondent?

7) If so, can it be justly and practicably cured?

8) If not, where, in all the circumstances, do the interests of justice lie?

1. That is not an exhaustive statement of matters which are potentially relevant. The consequences to the appellant of not being granted a protection visa are serious. There is no real prejudice to the Minister. Those matters weigh in favour of granting leave.
2. For the reasons given below, however, leave is not granted to raise the new grounds (namely grounds three to six) as those grounds have no real merit.

## Grounds 1 and 2

1. The Federal Circuit Court did not err in not holding that the Authority was “required to engage in more specific reasoning” in relation to threats which had been made to the appellant by the CID when it attended the appellant’s home.
2. The Authority was not required to engage in more specific reasoning than it did. It dealt with the claims put to it. It referred to and considered the two threats made by the CID in March 2012 and August 2012. It specifically stated that the threats were to the effect that the CID would shoot him (A[8], A[29] and A[35]) and accepted that the threats were made: at A[36] and A[42]. In light of the country information the Authority concluded:

42. … I note that the country information reports which indicate that if the applicant was thought to have been a member of the LTTE or associated with the LTTE in any way, other than by virtue of the fact that he lived in LTTE controlled territory and as such supplied the LTTE with vegetables, he would have been arrested and sent to a rehabilitation centre or prosecuted through the courts or detained, questions and released. The applicant does not claim that these things happened to him.

43. … I note the applicant’s claim that he took different paths when travelling to work and home, however in my view, it is reasonable to assume, that if the Sri Lankan authorities, including the CID, suspected the applicant of involvement with the LTTE or any militant separatist group, either in the past or at the time of their visits, they would have located the applicant, detained and questioned him. This did not happen.

…

46. I am satisfied, on the evidence, that the phone calls, requests for money, and visits to the applicant’s home by the CID amounts to monitoring and harassment of the applicant however I find that this treatment does not amount to serious harm. I am also satisfied that the phone calls, requests for money, and visits to the applicant’s home by the CID in 2011 and 2012 do not, of themselves, lead to a real chance of serious harm to the applicant in the reasonably foreseeable future in Sri Lanka.

1. The Authority did not fail to engage in an “active intellectual process” in relation to each integer of the appellant’s claims. No error is demonstrated in the reasoning of the Federal Circuit Court in this regard.

## Grounds 3 to 6

1. As to ground 3, the Federal Circuit Court stated at [29] and [30]:

29. I am satisfied that the Authority’s decision dealt adequately with the applicant’s asserted fear of harm based upon his past association with the LTTE. The Authority reasoned that if the applicant was really suspected of having LTTE links, he would have been arrested, and that the home visits and phone calls amounted to monitoring and harassment. Beyond that, it may be inferred from the facts accepted by the Authority, and from its reasons, that the applicant was a victim of attempted extortion by CID operatives abusing their authority. It may well be that the applicant genuinely feared harm because of those extortion attempts and left Sri Lanka in order to avoid them. However, the applicant did not claim protection from criminal extortionists. He claimed protection on the basis that he feared harm by reason of his past association with the LTTE. The Authority dealt with that claim.

30. It may be that the Authority should have done more to explore the issue of the extortion attempts in the context of complementary protection. No challenge was made in these proceedings, however, in respect of that aspect of the Authority’s decision.

1. Ground three, which had not been raised before the Federal Circuit Court was in the following terms:

The Immigration Assessment Authority should have done more to explore the issue of the applicant’s claims of extortion attempts in the context of complementary protection and failing to do so the Authority committed a jurisdictional error. The Federal Circuit Court Judge Driver failed to hold that the Authority committed a jurisdictional error.

1. The Authority dealt with complementary protection at A[67] to A[70]. At A[69], the Authority stated it was satisfied that there was not a real risk that the appellant would face significant harm (for the purposes of the complementary protection criterion) for the reasons it had given in relation to its consideration of whether the appellant had a well-founded fear of persecution (for the purposes of the refugee criterion).
2. The Authority had referred to the extortion at A[44] and concluded at A[46] that it did not give rise to a real chance that the appellant would face significant harm. The Authority adopted the reasoning in this respect when it came to consider complementary protection. The Authority dealt with the issue of extortion sufficiently in light of the way in which it was raised. No jurisdictional error has been identified.
3. In relation to the comment by the Federal Circuit Court at J[30] that it may be that the Authority should have done more to explore the issue, it is noted that there is no “duty to inquire”, although there may be situations in which a failure to make a particular inquiry has a sufficient link with the outcome such that there is a failure to review or such that the decision is affected in some way that manifests itself in jurisdictional error. This was explained in *Minister for Immigration and Citizenship v SZIAI* (2009) 83 ALJR 1123 at [25], where the High Court (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ) observed (citations omitted):

Although decisions in the Federal Court concerned with a failure to make obvious inquiries have led to references to a “duty to inquire”, that term is apt to direct consideration away from the question whether the decision which is under review is vitiated by jurisdictional error. The duty imposed upon the Tribunal by the *Migration Act* is a duty to review. It may be that a failure to make an obvious inquiry about a critical fact, the existence of which is easily ascertained, could, in some circumstances, supply a sufficient link to the outcome to constitute a failure to review. If so, such a failure could give rise to jurisdictional error by constructive failure to exercise jurisdiction. It may be that failure to make such an inquiry results in a decision being affected in some other way that manifests itself as jurisdictional error. …

1. There was no jurisdictional error on the part of the Authority in the present case arising from such considerations.
2. Ground 4 asserts that the Authority did not apply the real chance test. The Authority clearly understood that it was required to assess whether the appellant faced a “real chance” of harm and it applied that test: A[10], A[24], A[27], A[46], A[55], A[57], A[65].
3. Ground 5 asserts jurisdictional error in not accepting the claim made. This does not identify a jurisdictional error; all it does is take issue with the result. No jurisdictional error is made out.
4. Ground 6 asserts a failure to deal with “pre-trial detention” if the appellant were returned to Sri Lanka. However, no claim had been made in this respect and it was not a claim which, although unarticulated, clearly emerged from the material – cf: *NABE**v Minister for Immigration and Multicultural and Indigenous Affairs* (2004) 144 FCR 1 at [55], [58]-[61], [68] (Black CJ, French and Selway JJ). Accordingly, this ground is not made out.

# Conclusion

1. The appeal must be dismissed with costs.

|  |
| --- |
| I certify that the preceding forty (40) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Thawley. |

Associate:

Dated: 3 September 2018