FEDERAL COURT OF AUSTRALIA

CFG17 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs [2019] FCA 1495

|  |  |
| --- | --- |
| Appeal from: | *CFG17 v Minister for Immigration* [2018] FCCA 3664 |
|  |  |
| File number: |  |
|  |  |
| Judge: | **BROMBERG J** |
|  |  |
| Date of judgment: | 11 September 2019 |
|  |  |
| Catchwords: | **MIGRATION** – appeal of a decision of the Federal Circuit Court of Australia dismissing an application for judicial review of a decision of a delegate of the respondent (“delegate”) – whether the delegate failed to deal with a material claim made by the appellant – where it was alleged that the delegate failed to make inquiries – whether the delegate had an obligation to make inquiries – appeal dismissed. |
|  |  |
| Cases cited: | *AEG16 v Minister for Immigration and Border Protection* [2019] FCA 585  *MZARY v Minister for Immigration and Border Protection* [2018] FCA 374  *SZSXH v Minister for Immigration and Border Protection* [2014] FCA 914 |
|  |  |
| Date of hearing: | 9 September 2019 |
|  |  |
| Registry: | Victoria |
|  |  |
| Division: | General Division |
|  |  |
| National Practice Area: | Administrative and Constitutional Law and Human Rights |
|  |  |
| Category: | Catchwords |
|  |  |
| Number of paragraphs: | 30 |
|  |  |
| Solicitor for the Appellant: | Mr E Rajadurai |
|  |  |
| Counsel for the Respondent: | Mr G Hill |
|  |  |
| Solicitor for the Respondent: | Australian Government Solicitor |

ORDERS

|  |  |  |
| --- | --- | --- |
|  | | VID 1623 of 2018 |
|  | | |
| BETWEEN: | CFG17  Appellant | |
| AND: | **Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs**  Respondent | |

|  |  |
| --- | --- |
| JUDGE: | BROMBERG J |
| DATE OF ORDER: | 11 September 2019 |

THE COURT ORDERS THAT:

1. The appeal is dismissed.
2. The appellant pay the 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

BROMBERG J:

1. The appellant appeals from a decision of the Federal Circuit Court of Australia delivered on 12 December 2018 and published as *CFG17 v Minister for Immigration* [2018] FCCA 3664. By that judgment the primary judge dismissed the appellant’s application for judicial review of a decision made by a delegate of the respondent (“**Minister**”) to refuse to grant the appellant a Protection (Subclass XE-790) visa. The delegate also concluded that the appellant is an “excluded fast track review applicant” because he had made a claim for protection in the United Kingdom that was refused by that country. Consequently, the delegate’s decision was not reviewable by the Immigration Assessment Authority under Part 7AA of the *Migration Act 1958* (Cth).
2. The appellant is a Sri Lankan Muslim Tamil from eastern Sri Lanka who arrived in Australia in November 2012.
3. The claims made by the appellant are summarised at [4]-[6] of the primary judge’s reasons. The primary judge has also summarised the delegate’s finding at [7]-[19] of his Honour’s reasons. As the appellant’s grounds of appeal are of limited scope, it is not necessary to repeat a summary of the claims and findings other than in so far as that becomes necessary to address the appellant’s grounds of appeal.
4. The appellant was granted leave to file an Amended Notice of Appeal. The grounds of the appellant’s appeal are as follows (errors in original):

**Ground one**

His Honor erred in failing to find that the Delegate made a jurisdictional error of procedural fairness.

Particulars

Respondent failed to ask questions to extract information about the paramilitaries approaching the Applicant and the dangers faced by the applicant leading to persecution as there was a claim in the material before delegate.

**Ground two**

His Honor erred in failing to find that Delegate made a jurisdictional.

Particulars

Respondent failed to deal with a material claim of the Applicant, an extortion claim made by the Applicant regarding paramilitary.

**Ground three**

His Honour erred in failing to find that the Authority made a jurisdictional error by not applying well-founded fear test regarding extortion claims.

Particulars

Respondent failed to apply well-founded fear test as an implicit extortion claim was not dealt with.

1. The appellant was legally represented on the appeal and both written and oral submissions were received.
2. It was contended for the appellant that the delegate had not dealt with, or fully dealt with, a claim of extortion by “criminal and paramilitary groups” said to have been made by the appellant. The appellant contended that such a claim was explicitly raised by the appellant in the appellant’s application for the visa in the following observations:

Furthermore it is useful to mention that there are many underworld figures ruling in the Ottamavadi and valachchenai areas under the guise of political henchmen, paramilitary operators (mercenaries).

…

I have been on several occasions accosted by them and requested for my vehicle to be released for political propaganda and other uses, for which I had vehemently refused on the grounds that this is “my family bread and butter: and that I cannot part with them”.

During this period when I had travelled to Colombo on a rent-a-car hire, an unidentified gang of two on a motorcycle and armed with pistols had come to my home on a search operation and enquiring after me. On another date, when I was at home, they once again came in civilian clothing to my home with arms. Suspecting foul play, my father had told them that I was away, and in the meanwhile, I escaped from the rear entrance of my house.

1. In the oral submissions made by the appellant, the following further observations from the appellant’s visa application were relied upon (errors in original):

During this period, I had telephoned my father on many occasions, and who prevailed upon me to remain in the UK. Since on several occasions armed gangs had visited our house and demanded for my rent-a-car vehicle and which business was run by my wife under the supervision and guidance of my father. It is indeed opportune to mention here that my father is a highly respected civilian and social worker in our village, and as a result, my family had commanded the respect, affection and security of the villagers. In this backdrop, any outside threats directed at my family was obstructed with the intervention of the villagers.

1. Furthermore, in his oral submission, the appellant contended that the claim he had raised of extortion by criminal or paramilitary groups was a free standing claim. That is, it was a claim of harm from paramilitary groups unconnected with other claims made by the appellant that he feared harm (including from paramilitary groups) as a result of his perceived connection with the Liberation Tigers of Tamil Eelam (“**LTTE**”).
2. The appellant contended that the delegate failed “to delve into” the claims raised by him regarding paramilitary groups. It was said that the failure included, but was not limited to, who had approached the appellant, from which paramilitary group, for what purpose did they want the appellant’s vehicle and what they would have done to the appellant if he had consistently denied to oblige them. The written submission then said that the appellant contends “that there might have been an extortion claim overlooked by the Delegate”.
3. The written submission also said that that had the delegate asked further questions about the approaches of the paramilitary groups, the appellant would have received a favourable decision. It was then contended that the delegate had a duty to deal with the whole of the appellant’s case. Contentions to the same effect were made orally without the appellant’s legal representative referring the Court to any authority in support of the appellant’s contention that the delegate had an obligation or duty to inquire.

## Ground 2

1. It is convenient first to deal with ground 2 of the appellant’s grounds of appeal in which the appellant claims that the primary judge failed to identify jurisdictional error because the delegate failed to deal with a material claim made by the appellant being the extortion claim made by the paramilitary groups.
2. The appellant’s claim that the delegate failed to deal with an extortion claim was dealt with by the primary judge at [30]-[31] of the primary judge’s reasons.
3. As the Minister accepted, the delegate was required to consider all the integers of the claims put by the appellant. However, the delegate was not required to deal with claims which were not articulated or which did not clearly arise from the materials before the delegate. I discuss the relevant authorities in *AEG16 v Minister for Immigration and Border Protection* [2019] FCA 585 at [21]-[25].
4. It is clear that the appellant made various allegations concerning “underworld figures” or “paramilitary groups”. Those allegations are set out above in the material relied upon by the appellant. The fact that those allegations were made appears to have been appreciated by the delegate in one or more of the points referred to in the delegate’s summary of “protection claims” made by the appellant, as follows:

* Various criminal and paramilitary elements have sought to use the applicant’s vehicles. The applicant had refused all such demands as long as possible.
* When travelling to Colombo in the course of his business, an unidentified gang consisting of two people on a motorcycle, armed with pistols, came to his house enquiring after him.
* On another occasion the same unidentified people returned while the applicant was home. The applicant’s father told them he was away while the applicant fled from the rear of his house to stay with his friend, MALIK, who advised him to leave for Colombo by nightfall.
* Whilst in the UK, the applicant’s father informed him it was not safe for the applicant in Sri Lanka as on several occasions armed gangs had gone to his house, demanding his rent-a-car vehicle then operated by his wife.
* On 08 August 2008 two people with a weapon came to the applicant’s house for unknown reasons (possibly after refusing to give his rental car to someone or because of his support for MALIK and the Muslim Congress.

1. Unfortunately, the delegate’s decision is poorly constructed. Part 4 of the Decision, from which the matters extracted above have been taken, purports to be a summary of the appellant’s “claims for protection”. In fact what is summarised is not the appellant’s claimed fears of persecution, but the various factual allegations made by the appellant of various incidents relied upon by him in support of the claims made.
2. Neither the application of the appellant (where his claims are detailed), nor the reasons of the delegate are well-ordered and clear. However, fairly read, the appellant’s application indicates that he fled Sri Lanka for the UK in 2008 by reason of one particular fear and that after returning to Sri Lanka from the UK, he then fled to Australia in 2012 for a different fear. So far as the appellant explained why he fled to Australia, that was based upon the appellant’s fear that Sri Lankan authorities (either directly or with the assistance of paramilitaries) would harm him because of his involvement in transporting medical supplies for the LTTE.
3. That claimed fear is not relevant to the appellant’s second ground of appeal. The claimed fear that is relevant to that ground is the alleged reason why the appellant fled to the UK.
4. Fairly understood, the appellant claimed that the immediate reason he left Sri Lanka for the UK was because he feared being harmed by persons who, on 8 August 2008, came looking for him with weapons. The appellant was not able to affirmatively inform the delegate as to the reason those persons were seeking to harm him. He suggested that it may have been because he had refused to “give his rental car to someone”. In the context of the appellant’s evidence that he had been operating a rental car business and read with the allegations made in the appellant’s application which are here relied upon and set out at [6]-[7] above, the appellant made a sufficiently clear connection between his fear of physical harm from the persons looking for him and the possibility that the intended harm was by reason of his refusal to comply with the demands of “underworld figures” or “paramilitary operators” that he provide his car or cars to those persons.
5. It is necessary to observe, that none of the material put by the appellant before the delegate suggested that the appellant held a fear that he had been financially harmed by reason of being extorted. To the contrary, the appellant alleged that he had resisted demands made upon him to give over his vehicle or vehicles. What, however, the appellant’s evidence pointed to was a fear of physical harm, the possible or likely cause of which was the appellant’s resistance to the extortion afflicted upon him.
6. By the second ground of appeal, the appellant contended that he made an “extortion claim … regarding paramilitaries”. If that contention was intended to suggest that a claim was made by the appellant of extortion unconnected to his allegations or fears of physical harm by persons looking for him in 2008, I would reject it. What I accept was claimed by the appellant was that he held a fear that he would be physically harmed in the context of his belief that a possible or likely reason for that intended harm was his resistance to extortion demands made upon him by paramilitary or criminal groups.
7. The delegate seems to have determined the appellant’s claim on that basis. He did so by assessing the appellant’s allegation of intended harm. The delegate’s assessment was confined to the allegation of intended harm said to have occurred on 8 August 2008, being the incident that the appellant claimed led him to flee to the UK. The delegate rejected the appellant’s allegation that two armed assailants had come to his house on 8 August 2008 causing the appellant to flee to the UK to seek protection. Simply put, the delegate rejected the appellant’s claim that paramilitaries or criminal groups were intent on harming the appellant.
8. In so doing, the delegate did not expressly consider whether or not the appellant’s allegations that demands upon him for his car had been made by the paramilitaries or criminal groups. Those allegations were, however, referred to by the delegate when the delegate considered the appellant’s complimentary protection claim. Relevantly, the delegate said this:

I note the applicant claimed in his PV application that various people would seek the use of his cars for political or untoward purposes, however, as he claimed he was able to refuse the request (with the exception of transporting medical suppliers, which I have found not to be credible), I am satisfied they do not represent a real risk of significant harm.

1. It would appear therefore, that the delegate proceeded on the basis that he was prepared to accept that demands by various persons had been made upon the appellant for his cars and that those demands were refused by him. What the delegate, in essence, was not prepared to accept was that as a possible consequence of those refusals, the appellant had been subjected to threatened physical harm.
2. For those reasons, I would conclude that a claim that the appellant feared being subjected to physical harm, possibly or probably because he had resisted the attempts made by criminal or paramilitary groups to extort his cars, was raised by the appellant and was dealt with and dismissed by the delegate on the basis that the threat and claimed fear of physical violence was not accepted. The primary judge concluded that the material before the delegate did not appear to imply an extortion claim beyond the threat of physical violence that the appellant had articulated. In my view his Honour’s conclusion was correct.
3. For those reasons, the primary judge did not err and the appellant’s second ground of appeal must be rejected.

## Ground 3

1. The appellant’s third ground of appeal is contingent upon there having been a claim made which the delegate failed to consider. As that premise is incorrect the appellant’s third ground must also be rejected.

## Ground 1

1. Under ground 1, the appellant contended that the delegate failed to ask questions to extract information about the paramilitary groups. That argument was essentially dealt with by the primary judge at [21]-[29]. His Honour determined that the delegate did not have an obligation to make the inquiries which the appellant asserts the delegate should have made.
2. There is no error in the approach taken by the primary judge. As his Honour observed, the delegate was not required to prompt an elaboration of the matters that the appellant chose to claim: *SZSXH v Minister for Immigration and Border Protection* [2014] FCA 914 at [22] (Edmonds J). This was not a case where the delegate failed to make an obvious inquiry about a critical fact, the existence of which was easily ascertainable and which supplied a sufficient link to the outcome as to constitute a failure to review: see *MZARY v Minister for Immigration and Border Protection* [2018] FCA 374 at [10]-[11] (Bromberg J).
3. For those reasons the appellant’s first ground of appeal must also be rejected.

## Conclusion

1. As I have rejected the appellant’s grounds of appeal, the appeal must be dismissed. I will make an order to that effect and an order that the Minister’s costs of the appeal be paid by the appellant.

|  |
| --- |
| I certify that the preceding thirty (30) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Bromberg. |

Associate:

Dated: 11 September 2019