FEDERAL COURT OF AUSTRALIA

BEA15 v Minister for Immigration and Border Protection [2020] FCA 392

|  |  |
| --- | --- |
| Appeal from: | *BEA15 v Minister for Immigration and Border Protection (No 2)* [2019] FCCA 717  |
|  |  |
| File number: | NSD 783 of 2019 |
|  |  |
| Judge: | **PERRAM J** |
|  |  |
| Date of judgment: | 26 March 2020 |
|  |  |
| Catchwords: | **MIGRATION** – appeal from Federal Circuit Court – whether Court erred in dismissing application for judicial review of decision of Refugee Review Tribunal to refuse to issue protection (Class XA) visa – where Appellant sought protection on basis of links with Liberation Tigers of Tamil Eelam, status as a failed refugee, race and religion – where Tribunal found letter relied on by Appellant not authentic – whether Tribunal erred in finding Appellant gave inconsistent and improbable evidence – whether Tribunal erred in finding concerning Appellant’s credit  |
|  |  |
| Legislation: | *Migration Act 1958* (Cth) s 424A  |
|  |  |
| Cases cited: | *BEA15 v Minister for Immigration* [2018] FCA 639*JPQS Pty Ltd v Cosmarnan Constructions Pty Ltd* [2003] NSWCA 66  |
|  |  |
| Date of hearing: | 19 November 2019 |
|  |  |
| Registry: | New South Wales |
|  |  |
| Division: | General Division |
|  |  |
| National Practice Area: | Administrative and Constitutional Law and Human Rights |
|  |  |
| Category: | Catchwords |
|  |  |
| Number of paragraphs: | 54  |
|  |  |
| Counsel for the Appellant: | Mr G Foster (Pro Bono) |
|  |  |
| Counsel for the First Respondent: | Ms R Francois |
|  |  |
| Solicitor for the First Respondent: | Minter Ellison |
|  |  |
| Counsel for the Second Respondent: | The Second Respondent did not appear |

ORDERS

|  |  |
| --- | --- |
|  | NSD 783 of 2019 |
|   |
| BETWEEN: | BEA15Appellant |
| AND: | MINISTER FOR IMMIGRATION AND BORDER PROTECTIONFirst RespondentREFUGEE REVIEW TRIBUNALSecond Respondent |

|  |  |
| --- | --- |
| JUDGE: | PERRAM J |
| DATE OF ORDER: | 26 MARCH 2020 |

THE COURT ORDERS THAT:

1. The appeal be dismissed.
2. The Appellant pay the First Respondent’s costs as taxed or agreed.
3. These orders take effect on 30 June 2020 or such later date as the Court subsequently determines.

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

REASONS FOR JUDGMENT

PERRAM J:

1. The Appellant is a young Sri Lankan man of Tamil ethnicity who was born in the Eastern Province of Sri Lanka, which is predominantly Tamil (indeed, prior to the civil war it was said to be something of a Tamil stronghold). In July 2012, he fled Sri Lanka departing that country on board a boat and contrary to the law of Sri Lanka. He arrived in Australia on 31 July 2012 and sought refuge. As is common in refugee cases, the Appellant did not have a visa. As such he was taken into immigration detention and processed.
2. On 14 December 2012 the Appellant applied for a protection (Class XA) visa. There are various criteria for the grant of a protection visa but the main criterion is that one must be a refugee, that is to say, one must have a well-founded fear of persecution if repatriated to one’s country of origin on the basis of race, religion, nationality, political opinion or membership of a particular social group. As is usual in such matters, the Appellant put his case several ways. He said he would be persecuted because as a young Tamil male he would be regarded as having links with the Liberation Tigers of Tamil Eelam (‘the LTTE’) (‘Eelam’ is the Tamil name for Sri Lanka). The Appellant also said that if his protection visa application were unsuccessful and, as a consequence, he was returned to Sri Lanka he would become a member of the particular social group in Sri Lanka consisting of failed asylum seekers who had departed Sri Lanka illegally. On the basis of that anticipated membership he claimed to have a well-founded fear of persecution. The Appellant also submitted he had a well-founded fear of persecution on the basis of his race (Tamil) and his religion (Hindu).
3. The Appellant’s application was dealt with by a delegate of the Minister (‘the delegate’) who, on 3 January 2014, decided that the Appellant’s visa application should be refused. The Appellant applied for a review by the then Refugee Review Tribunal (‘the Tribunal’). A member of the Tribunal interviewed the Appellant on 7 May 2015 and, on 28 May 2015, she decided to affirm the delegate’s earlier decision to refuse the application. The Appellant filed an application for judicial review shortly afterwards. Judge Street sitting in the Federal Circuit Court of Australia refused that application in 2017 after a brief hearing and the delivery of reasons ex tempore. His Honour’s orders were reversed on appeal to this Court by Burley J who concluded that Judge Street had failed to consider fundamental aspects of the Appellant’s case and had delivered reasons which were legally inadequate: *BEA15 v Minister for Immigration* [2018] FCA 639. The matter was then remitted for a second hearing in the Federal Circuit Court before a judge other than Judge Street.
4. This second hearing took place on 21 March 2019 before Judge Driver. His Honour refused the application, this time on 7 May 2019: *BEA15 v Minister for Immigration and Anor (No.2)* [2019] FCCA 717. His Honour’s reasons are detailed and gave a thorough and, if I may say with respect, comprehensive account of the various complexities that the Appellant’s application presented.
5. It is from the orders giving effect to that conclusion that the Appellant now appeals to this Court.
6. For the reasons which follow the appeal should be dismissed with costs.
7. The Appellant’s basic contention in his visa application was that for a raft of reasons it would be bad for him if he were returned to Sri Lanka. In support of this contention the Appellant relied upon a letter dated 7 February 2015 purportedly from the Sri Lankan police which was headed ‘MESSAGE FORM’ and which appeared to require him to come to the Terrorist Investigation Division at Anuradhapura Police Station, on 25 February 2015 at ‘about 10am’. I interpolate here that for a young Tamil man the Terrorist Investigation Division of the Sri Lankan police is not ordinarily a wholesome place in which to find oneself. Although the letter is now many years old, the contrary was the case in May 2015 when the Tribunal conducted its hearing. The reasons for the delay between the date of the letter and the proceedings before this Court are obvious and require no further comment other than that they should not have occurred.
8. Although the letter is dated 7 February 2015, it was not provided to the Tribunal until 30 April 2015 when it came to be attached as an annexure to an elaborate written submission made to the Tribunal on the Appellant’s behalf.
9. The principal forensic import of the letter was to show that should the Appellant be returned to Sri Lanka, the Terrorism Investigation Division would be looking for him and that if he were to suffer the misfortune of them succeeding in that endeavour then this would engender, or might be thought to engender, a state of affairs for him that was, at best, discomforting and, at worst, something perhaps more lasting. The letter also possessed the potential forensic advantage of buttressing the Appellant’s claim that he was perceived in Sri Lanka as having links to the LTTE. Why else, on this view, would the Terrorism Investigation Division be looking for him?
10. There were two versions of the letter in the appeal papers before this Court. One was a copy of the original which is largely in attractive Sinhalese script although it does have some English printed headings which are all in capital letters such as ‘SRI LANKA POLICE’ and ‘MESSAGE FORM’. The judge in the Court below referred to this as Roman script and, it is true, the use of capital letters does contribute to a vague sense that one might be reading an inscription on the Pantheon. However, I would prefer to say that parts of the letter are written in English. The other version of the letter was a complete English translation. Both are, to an extent, indistinct and hence difficult, although not altogether impossible, to read.
11. The Tribunal was not in the least swayed by either version of this letter for it did not accept that the original was itself an authentic document. This adverse conclusion it reached for a number of reasons. The problem confronting the Appellant was the apparently long delay between the date of the letter (7 February 2015) and the time at which it was first provided to the Tribunal on the Appellant’s behalf (30 April 2015). This was a period of close to three months. Much of the Appellant’s account of events was directed therefore to demonstrating that the letter’s arrival had been retarded by circumstances beyond his control. The competing hypothesis, which the Tribunal actively sought to probe, was that the letter was forged and had been generated at the last moment before the hearing to support his case.
12. In his attempts to explain the delay the Appellant had first claimed that the letter had been sent to his family’s old address at which they no longer lived and that a thoughtful neighbour had been kind enough to pass it on to his mother. However, the Tribunal found that the Appellant had provided inconsistent evidence about whether his family had moved address. The critical part of the Tribunal’s reasoning on the issue of the family’s address is at [27]:

Initially, he claimed the letter was sent to their old home address and a neighbour gave it to his mother. The tribunal expressed concerns about inconsistent evidence that his family had moved address as at the outset he claimed they had been living in the same place for the last 5 years. The applicant said they were in the house two years before he left SL but he did not know when they moved. Later he added they moved 6 or 7 months ago but he did not know their address. The tribunal considers the applicant had gave [sic] inconsistent evidence about whether his family had moved. The tribunal considers he was being evasive and making up answers to coincide with trying to explain the delay in receiving the police letter and his inconsistent evidence about whether the family moved address.

1. Was this reasoning sound? The relevant evidence commenced at p 6 of the Tribunal’s transcript and concerned where his family was living and that his father was living elsewhere. It was as follows:

MS GRAU: Okay. All right. And your family where are they living at the moment?

THE INTERPRETER: Mum, brothers, sisters, living in … in Trincomalee and father in … and my elder brother in Mannar.

MS GRAU: Okay. So how long has your mum and siblings been living in Trincomalee?

THE INTERPRETER: About five years. They are living in … for about five years now.

MS GRAU: Can you spell that, the name of the town?

THE INTERPRETER: A-m-b-a-l-i-p-u-r-a-n. A-m-b-u V-a-l-i-p-u-r-a-n.

MS GRAU: Okay. And dad’s in … How long has he been there?

THE INTERPRETER: So about one year ago they settled people there. So it’s a temporary shelter and he is – they are staying there.

MS GRAU: So why is he not with mum and siblings; are they separated?

THE INTERPRETER: Okay. In the other place there is no educational facilities so my sister is studying in Trincomalee; for that reason they are in Trincomalee.

MS GRAU: Okay. And how long has your brother been in Mannar?

THE INTERPRETER: About 10 years.

MS GRAU: Okay. And does he have a family?

THE INTERPRETER: Still single.

1. From this it can be gleaned that the Appellant’s mother, brothers and sisters have lived in Trincomalee in a town called Ambalipuran or Ambuvalipuran for about five years. Recourse to a map (a legitimate source of judicial notice: *JPQS Pty Ltd v Cosmarnan Constructions Pty Ltd* [2003] NSWCA 66 at [2]) reveals that Trincomalee is a district of Sri Lanka as well as a city within that district. The spelling of Ambuvalipuran varied through the hearing. At p 14 of the transcript it is spelt Anpuvelipuram. A map also reveals that the city of Trincomalee has a suburb called Anbuvalipuram. I infer that this is what the Appellant was referring to. I pause to note that to say that one has lived in the suburb of Anbuvalipuram for a number of years does not as a matter of logic entail necessarily that one has not moved house within Anbuvalipuram.
2. The next important piece of the evidence concerns the Appellant’s uncle. Although it is not directly material to the present issue, it is useful to know that part of the Appellant’s case turned on the fact that his uncle had been kidnapped in 2008 and had not been seen since. In the Appellant’s interview it transpired that the Appellant’s family had lived in the uncle’s house ‘at 320/1’, a reference which assumes larger significance in due course (p 8 of the transcript):

MS GRAU: Okay. So you haven’t heard – no one knows what’s happened to your uncle?

THE INTERPRETER: So far we don’t know what has happened to him.

MS GRAU: Okay. And was he on your mother’s side or your father’s side?

THE INTERPRETER: Mother’s side.

MS GRAU: So was he a member of LTTE, do you think?

THE INTERPRETER: No. He didn’t have any connection with anybody.

MS GRAU: Okay. What did he do? What was his job?

THE INTERPRETER: Again, Jewellery business.

MS GRAU: And where did he live?

THE INTERPRETER: He lived in 320/1 …

MS GRAU: So how – was that – what province is that in?

THE INTERPRETER: It’s Eastern Province.

MS GRAU: And how far away is that from your home?

THE INTERPRETER: So during the troubled time they have gone to India so we were living in their house.

MS GRAU: Okay. And so how long were they – was your uncle and his family in India?

THE INTERPRETER: About one year.

1. At p 9 of the transcript, the Appellant also indicated that at the time his uncle was kidnapped in 2008 he and his family were living in his uncle’s house.
2. The key points here are: (a) the uncle had lived at ‘320/1’ at an untranscribed location in the Eastern Province; (b) during the troubled times the uncle and his family went to India; (c) whilst the uncle was in India during the troubled times, the Appellant and his family lived at ‘320/1’; and, (d) the Appellant and his family lived in this house for about a year. The ‘troubled times’ may be a reference to the final year of the 25-year Sri Lankan civil war which ended in May 2009. This involved a well-known humanitarian catastrophe in the Northern Province as the Government moved to crush the remaining forces of the LTTE. But Trincomalee is in the Eastern Province and it fell to Government forces much earlier in 2007 so the ‘troubled times’, so far as the Appellant is concerned, may be a reference to that year. This would be more consistent with the Appellant’s evidence that his family was staying at his uncle’s house at the time his uncle was kidnapped in 2008.
3. The discussion of the communication from the Sri Lankan Police begins at p 14. At the outset the Appellant seeks to explain that the letter had been delivered to an address from which the family had moved at the time of its delivery:

MS GRAU: Okay. And look, while I might accept that your uncle was abducted in 2008 because that’s consistent with country information, particularly during the war – that there were lots of disappearances, the situation’s improved significantly since then. Now, I see you’ve also provided a document from the Sri Lanka police. What’s – can you tell me about that?

THE INTERPRETER: Okay. Recently, only I got this document because about two months ago – okay. So because – about living in another house before in Anpuvelipuram and the – for this house there – this – that had come. The address 433A Anpuvelipuram. So we had shifted from that house to another house, so the neighbour of that house had given this letter to my mum, then my mum said, ‘In your name there is a letter in Sinhalese. We don’t know what it is written there’, so I asked them to read it to a person who can read Sinhalese and get it translated through him.

1. This was said on 7 May 2015. So much is clear. What was said is, however, not clear. But I would read the Appellant’s statement as being to the effect that he only recently came into possession of the letter.
2. The next part of the transcript which relates to this issue starts at p 15. At this part of the transcript the Appellant says that the letter had been sent to the house the Appellant’s family had previously lived in (scil. 433A in Anbuvalipuram) and that they had lived in that house for about two years:

MS GRAU: And so you said that it came to that house that your parents were no longer – that your family was no longer living in?

THE INTERPRETER: The place we have been living before.

MS GRAU: So when were you living in that place?

THE INTERPRETER: About two years we were living in that house. Okay. So when I was there I – we lived there about two years in that house, but after I left how long they were staying I didn’t know.

1. At this point the Tribunal apprehended the inconsistency between the Appellant’s earlier evidence that the family had been living in Anbuvalipuram for five years and this evidence that his family had lived at the house addressed 433A Anbuvalipuram for two years (p 15):

MS GRAU: Didn’t you say early in the hearing that your family had been in the same place for five years?

THE INTERPRETER: Okay. I told before that we were living in my uncle’s house 320/1.

MS GRAU: No, I asked you at the beginning how long – where your family were living and how long had they been living there, and you said five years.

THE INTERPRETER: Okay. Okay. So I was telling that I was – we were living in my uncle’s house – still we are living in Anpuvelipuram since we came there we are living about seven, eight years now.

1. In fact, the Appellant had not said that the family had lived in the same place for five years. What he had said was that his family had lived at his uncle’s house while the uncle was in India during the troubled times and also at the time when the uncle had been kidnapped in 2008. He had also said that his family had lived in Anbuvalipuram for five years but he did not say that they had lived in the same house for five years and it is apparent he had already said that they had lived in at least two houses in that suburb. In his last answer he was suggesting they had lived in the suburb of Anbuvalipuram for seven or eight years.
2. The Tribunal then pursued the matter at p 16:

MS GRAU: So where have you been living seven or eight years?

THE INTERPRETER: Anpuvelipuram Trincomalee.

MS GRAU: Okay. And so what are the street addresses that you’ve been living?

THE INTERPRETER: In the beginning 320/1 Anpuvelipuram Trincomalee. After that we moved to 433A Anpuvelipuram. Okay. And then recently my family had shifted and I don’t know the address.

1. This is consistent with the evidence that the Appellant had given. He had given the uncle’s address as ‘320/1’ as I indicated above. The uncle lived in Anbuvalipuram in Trincomalee. The Appellant then had moved to 433A also in Anbuvalipuram Trincomalee. The Appellant’s family had more recently moved which was the first reason put forward by the Appellant as to why there had been a delay in the provision of the letter to the Tribunal. But this new (and third) address he did not know. The Tribunal was incredulous about this:

MS GRAU: So they haven’t told you the address even though you’re in contact every day?

THE INTERPRETER: Okay. I don’t know the number, but I can say the street where they are living on. The name of the street Umbal Street Anpuvelipuram.

MS GRAU: So when did they move?

THE INTERPRETER: About six, seven months now.

1. So the Appellant did know the street name, Umbal Street. He now dated the time of his family’s move at six or seven months before the hearing. This would mean they moved from 433A to Umbal Street in November or December 2014. The Tribunal continued at p 16:

MS GRAU: Okay. So why did you say earlier that you didn’t know when they moved?

THE INTERPRETER: Okay. I cannot say exact date, but I can see how long they – shifted.

1. The Appellant had previously said (as excerpted above at [20]) that he did not know how long his family lived at the 443A house after he departed Sri Lanka:

THE INTERPRETER: About two years we were living in that house. Okay. So when I was there I – we lived there about two years in that house, but after I left how long they were staying I didn’t know.

1. The Tribunal ultimately did not accept this chronology at [27] of its reasons. It is useful to set it out again:

Initially, he claimed the letter was sent to their old home address and a neighbour gave it to his mother. The tribunal expressed concerns about inconsistent evidence that his family had moved address as at the outset he claimed they had been living in the same place for the last 5 years. The applicant said they were in the house two years before he left SL but he did not know when they moved. Later he added they moved 6 or 7 months ago but he did not know their address. The tribunal considers the applicant had gave [sic] inconsistent evidence about whether his family had moved. The tribunal considers he was being evasive and making up answers to coincide with trying to explain the delay in receiving the police letter and his inconsistent evidence about whether the family moved address.

1. This is wrong in two respects. *First,* the Appellant never said the family had only lived in one place in the suburb of Anbuvalipuram. He had told the Tribunal that his family had been living in Anbuvalipuram for five years. The Appellant had also made clear at the outset that his family had lived at their uncle’s house (‘320/1’) in the same suburb and his account at all times involved at least two houses. The second sentence of [27] therefore involves a failure to comprehend what the evidence actually was. In effect, the Tribunal has reasoned this way: the statements ‘I have lived in Sydney for 10 years’ and ‘I moved house in 2004 and 2009’ are inconsistent. It failed to grasp that Anbuvalipuram is a suburb or to understand the import of the Appellant’s evidence that the family had stayed at the uncle’s house during the troubled times and up to the time the uncle was kidnapped. *Secondly*, it is not the case that the Appellant did not know his family’s new address—he identified the street name at Umbar Street. What he could not recall was the street number.
2. In the Court below the Appellant’s basic submission that ‘the Tribunal had misunderstood what the applicant had said: they had lived in the same town, not the same house’ was recorded at [34] as was the submission that he had said the family had lived at three addresses. The Minster’s responsive submission was recorded at [66]:

The Minister submits that, while the applicant's submissions contend that the applicant’s evidence was not inconsistent insofar as the applicant's evidence that his family had lived in the same place for five years could mean that they lived in the same village (rather than the same house) for five years, the applicant's submissions fail to acknowledge or contend with the clear inconsistency in the applicant's evidence about when his family moved, which immediately preceded (in the Tribunal’s reasons) the Tribunal’s finding that the applicant had given inconsistent evidence.

1. I take the reference to the ‘clear inconsistency in the applicant’s evidence about when his family moved’ to be a reference to the apparent contradiction between the Appellant’s statement that he did not know when his family moved and his later statement that they moved six or seven months before the Tribunal hearing. While this may indicate a slight inconsistency in the evidence given by the Appellant about when his family moved, this does not respond to the Tribunal’s conclusion of inconsistency as to whether the Appellant’s family moved at [27] of its reasons.
2. The learned primary judge dealt with the matter at [123]-[124]:

In relation to the first ground, insofar as it relates to the applicant’s evidence about the town in which his family lives, I agree with the submissions of the Minister. The Tribunal’s finding at [27] was logically open to it on the material before it. The Tribunal was entitled to find, as it did, that the applicant’s evidence was inconsistent. The Tribunal drew the inconsistency to the applicant’s attention for comment but the Tribunal was not satisfied with his response.

In my view, the applicant’s assertions in relation to this issue amount to an attempt to reconstruct, after the event, a logical consistency of evidence which appeared to the Tribunal to be inconsistent and was inconsistent. Even if I were to accept the applicant’s submissions, they do not explain the inconsistency in the applicant’s evidence about when his family moved, which appears to have been what was in the forefront of the Tribunal’s mind when it found he had given inconsistent evidence.

1. I do not think I agree with his Honour in relation to this issue. It seems to me tolerably clear that the Tribunal misunderstood what the Appellant was saying about where the family had lived within Trincomalee. I do not, in that regard, think it is correct to characterise this element of the Appellant’s submissions as an ex post facto reconstruction. Were it necessary, I would characterise the way the Tribunal dealt with this aspect of the matter as involving a serious misunderstanding of what was being put to it. This argument related to ground 1a.
2. Assuming in the Appellant’s favour that ground 1a involved some species of jurisdictional error I do not think it goes anywhere, however. The Tribunal had independent reasons for not accepting the Appellant’s account of why the delay in the provision of the letter occurred. These related to the second part of the Appellant’s explanation for the delay which concerned what had happened when the letter had finally arrived with his family at their new address. According to the Appellant the letter had arrived to his family about two months before the hearing in the Tribunal. This would put the letter’s arrival at some point in March 2015 and they, in turn, had only informed him of its existence two or three weeks before the hearing (which would be sometime towards the middle of April). This left a not insignificant period during which his family had not informed him of this apparently important letter.
3. The thrust of the Appellant’s response to this problem was to suggest that his family had not immediately appreciated the letter’s significance. That explanation went as follows: at first his mother had called him to say that she had received a letter for him but that unfortunately she could not read it because it was in Sinhalese (presumably, I infer, because many Tamils cannot read Sinhalese). The Appellant had then told his mother to find someone who could read Sinhalese. This the Tribunal seized upon because, so it reasoned, if the Appellant’s mother could not read Sinhalese she could scarcely have known that it was addressed to the Appellant. Consistent with notions of procedural fairness, the Tribunal challenged the Appellant about that evident difficulty. His response: although the communication was in Sinhalese, it had arrived in an envelope which was addressed to him in English; not only that, but his sister (who appears to have lived with the Appellant’s mother) *could* read English. The problem was solved. He did not say *when* his sister had read the envelope and he did not suggest that she might have delayed in doing so. As will be seen this is of some significance later.
4. The Tribunal’s concerns were not altogether allayed by this explanation. Why, it asked, would a letter written in Sinhalese be delivered in an envelope addressed in English? The Appellant proffered no explanation.
5. There were other problems. The Tribunal had suggested to the Appellant that it seemed unlikely that his family would fail to pass on a letter for him from the police for two months. To this the Appellant had re-joined that his family did not know it was from the police because it was in Sinhalese. However, as the Tribunal pointed out, the letter in Sinhalese is actually headed in English: ‘SRI LANKAN POLICE’. To this the Appellant had replied that his family had not opened the letter and so could not have known this. However, as the Tribunal pointed out, the family knew the letter was in Sinhalese so that they *must* have opened it.
6. Thus even accepting that the Tribunal may have erred in its treatment of the chronology of the family’s residence, it is difficult to see how the Appellant can escape the force of the Tribunal’s observation that the family must have opened the envelope to know it was in Sinhalese script and hence must have known much earlier than his account would allow that it was from the police and therefore of some importance. The Tribunal thought it implausible that the family would not have contacted him earlier in the case of such a letter from the police. The Appellant challenges this finding in ground 1c and ground 2 (there is no ground1b). However, I do not accept either ground.
7. As to ground 1c, there were two points to this challenge. The first was that it was erroneous to think that it was improbable that the Appellant’s family would not mention the letter to him despite being in daily contact with him. This was only improbable if the Appellant’s family knew what the letter was. But it was said that the family were not aware that it was addressed to the Appellant until his sister (who could read English) saw the envelope. If the Appellant could establish that the sister saw the envelope several weeks after the Appellant’s mother first saw it perhaps there would be something in this. But the Tribunal made no finding about that and indeed there was no evidence from the Appellant about it either. Accordingly, it cannot succeed. The second aspect of this was a variant of the same point. There was, on this view, an underlying assumption that the Appellant’s family knew his name was on the envelope. But this was said not be demonstrated because the Tribunal had made no finding as to when the sister had read it. Again I reject this. There was no finding about when the sister read it and no attempt by the Appellant to say when she read it.
8. Turning to ground 2, the Appellant criticised the Tribunal’s findings on the Appellant’s credit. The centrepiece of these concerned its conclusions arising from the letter being in Sinhalese and the impossibility of his family knowing that unless the envelope had been opened.
9. The critical part of the Tribunal’s reasons were at [28]-[29]:

The applicant claimed his mother called the applicant and told him there was a letter in his name but it was in Sinhalese. He told them to get it read by someone who could read Sinhalese. When the tribunal expressed doubt how they knew it was for him if they did not read Sinhalese, he said his name was in English on the envelope and his sister can read English. When the tribunal expressed doubt that it would be addressed to him in English and written in Singhalese, the applicant did not know the reasons why. The tribunal does not accept the police message, written in Sinhalese, would be addressed to him in his name in English on the envelope. Given many Tamils do not read Sinhalese or English that it would be addressed to him in English is not credible.

Further, while he said his family received the message two months ago, they did not tell him until two or three weeks ago. That his family would not tell him about it, given they are in contact daily lacks credibility. The applicant initially claimed when he called about sending his uncle’s ID card they told him about the letter for him. When the tribunal expressed concern that his family would hold onto a police document for two months and not tell him about it, he said they did not know it was from the police as it was in Sinhalese. When the tribunal noted the document said Sri Lanka police in English and his sister read English, the applicant said they did not open the letter but it had his name on it. However, this was inconsistent with the applicant’s earlier evidence that his parents had told him there was a letter in his name and it was in Sinhalese. The only way they would have known it was in Sinhalese would have been to open it. The message headings of Sri Lanka police were written in Sinhalese and English and on the applicant’s evidence his sister reads English.

(Emphasis added.)

1. The evidence about the envelope was as follows. The first mention of the communication by the Appellant was at p 14 of the transcript:

THE INTERPRETER: Okay. Recently only I got this document because about two months ago – okay. So because – about living in another house before in Anpuvelipuram and the – for this house there – this – that had come. The address 433A Anpuvelipuram. So we had shifted from that house to another house, so the neighbour of that house had given this letter to my mum, then my mum said, ‘In your name there is a letter in Sinhalese. We don’t know what it is written there,’ so I asked them to read it to a person who can read Sinhalese and get it translated through him.

MS GRAU: So they had called you before they knew what the letter said. They didn’t?

THE INTERPRETER: Yes. They told me there was a letter for me in the Sinhalese so I told them to read it to someone who can read Sinhalese.

MS GRAU: Why wouldn’t they get someone to do that before they telephoned you?

THE INTERPRETER: Okay. So I was not there, so when I was calling home, they said ‘There was a letter for you in Sinhalese,’ so then I told them to get it translated from someone who can speak – read – read Sinhalese.

MS GRAU: So they can read your name in Sinhalese?

THE INTERPRETER: No.

MS GRAU: But isn’t the whole document written in [Sinhalese] including your name, so how would they know it’s got to do with you?

THE INTERPRETER: Okay. So on the – envelope of the letter the name was written in English, so my sister had read it and through that only they knew that it was my name.

MS GRAU: So your name was written in English on the envelope?

THE INTERPRETER: Yes.

1. The key points of this evidence are: (a) the Appellant claimed that his mother had told him that there was a letter in his name in Sinhalese; (b) the family could not read the letter because it was in Sinhalese; (c) the Appellant told them to get someone who could read Sinhalese to read it; (d) his name on the envelope was in English; and, (e) his sister could read his name (presumably because she could read English). Pausing there, the fact that the family knew the letter was in Sinhalese is only consistent with them having examined its contents, which is to say, having opened it.
2. The full text of the letter in English is as follows:

**SRI LANKA POLICE**

**MESSAGE FORM Police 265**

Date } 2012 /02/07 Time of Receipt } 19:10

From Station: Anuradhapura To Station: Trincomalee

Sending Operator: PC 62330 Receiving Operator: PS 13018

From: H.Q.I. To: H.Q.I. No: 98

You inform to one [name] Bearing National Identity Card No. [number] of No. 433A, Anpuvalipuram, Trincomalee, is in your Police area, to come to the Terrorist Investigation Division in Anuradhapura Head Quarter Police station give evidence on 2015.02.24 at about 10.00 o’clock.

Sgd...

Head Quarter Chief Inspector of Police,
Head Quarter Police Station,
Anuradhapura.

1. It is worth noting that the Appellant submits that the date of the letter in the English translation of the letter (2012/02/17) is incorrect and should be 2015/02/17 as reflected in the original Sinhalese version of the letter.
2. It is reasonably plain that this is a communication from one police station to another (Anuradhapura to Trincomalee) which is consistent with it being headed ‘SRI LANKA POLICE’ and ‘MESSAGE FORM’. Just why such an internal police document would be left at the premises is a matter which is not entirely clear but which did not, in any event, delay the Tribunal. Its understanding is illustrated at p 15 of the transcript:

MS GRAU: So why would that – why would they do that when the document itself seems – says ‘you are to inform one [Applicant’s name]’, and it sounds like the actual message is not for you but for someone else in the house to pass it on to you?

THE INTERPRETER: Okay. The letter was posted to my name. That’s why they told me that it was in my name, for reasons I don’t know what’s the reason like that it be in the letter.

1. The Tribunal then moved on to the topic of why it had taken from 7 February 2015 until 30 April 2015 for the Appellant to become aware of the contents of the message. The Tribunal at first asked the Appellant when it was that his family had informed him about the letter and the answer was that it was about two to three weeks before the hearing (i.e. in April not long before it was forwarded to the Tribunal) (p 16):

MS GRAU: Okay. So when did she tell you about it?

THE INTERPRETER: About two, three weeks ago, she has told me.

1. This naturally raised an issue as to why the family had sat on the letter for around two months before telling him about it, especially in light of its importance. The Tribunal put it this way:

MS GRAU: So why did it take her so long to tell you about it?

THE INTERPRETER: Okay. So when I called them and told about, to send the ID card of my uncle, then they said there’s a – there was a letter for you in your name. Then I said … then I told them to better read about it and see what is in this letter. Then only they told this had happened.

MS GRAU: So how long have they had the letter?

THE INTERPRETER: I think about two months.

1. But why would this be so? Surely an important document of the kind in question would be brought to the Appellant’s attention immediately. Not so:

MS GRAU: So they’ve got a letter – they hold onto a letter that they’ve received for two months that they can’t read that’s in your name that appears to be from the police.

THE INTERPRETER: They didn’t know it was from the police. After getting it read by the person who knows to read how Sinhalese, they got to know it was from police.

1. So here the point the Appellant was making was that only someone who could read Sinhalese could have appreciated it was from the police. There was a problem with this. This was that even in the Sinhalese original of the letter the words ‘SRI LANKA POLICE’ are in English and his sister could read English. The Tribunal challenged the Appellant this way:

MS GRAU: But it says in English, Sri Lanka Police message form and your sister reads English.

THE INTERPRETER: Okay. Okay. It was – the letter was in an envelope and they didn’t open the envelope, so the name was written on the envelope so they knew it was for me so they kept it like that.

1. The Appellant therefore correctly perceived that it was forensically necessary to keep the contents of the letter (as opposed to his name which was written on the front) out of the mind of his family for the purposes of his argument. There was a problem with this approach, however, and it was that the Appellant had given evidence that the family were aware that the letter was in Sinhalese (as extracted above at [41]). The logic appeared to be that the Appellant’s family could not have known this unless they had opened the envelope. But it was also the Appellant’s final evidence that they had not opened the envelope.
2. The Tribunal ultimately acted on this apparent contradiction at [29] which I have set out above. I do not think that that reasoning can be described as irrational. Indeed, far from it. The Tribunal’s point that the Appellant’s family could not have known that the letter was in Sinhalese unless they had opened it, has no apparent answer. This was the conclusion of the primary judge with which I agree.
3. I have considered an alternate challenge to the finding based on the notions of procedural fairness inherent in s 424A of the *Migration Act 1958* (Cth). Section 424A(1) provides:

**Information and invitation given in writing by Tribunal**

(1) Subject to subsections (2A) and (3), the Tribunal must:

(a) give to the applicant, in the way that the Tribunal considers appropriate in the circumstances, clear particulars of any information that the Tribunal considers would be the reason, or a part of the reason, for affirming the decision that is under review; and

(b) ensure, as far as is reasonably practicable, that the applicant understands why it is relevant to the review, and the consequences of it being relied on in affirming the decision that is under review; and

(c) invite the applicant to comment on or respond to it.

1. There is nothing in the appeal papers to suggest that the Appellant was invited to make a submission about this in writing. However, the contradiction upon which the Tribunal relied was not ‘information’ within the meaning of s 424A(1); rather it was part of a process of identifying an inconsistency. ‘Information’ in s 424A(1) does not include the existence of doubts, inconsistencies or the absence of evidence: *SZBYR v Minister for Immigration and Citizenship* [2007] HCA 26; 235 ALR 609 at 1196 [18]. Accordingly, I do not think a challenge on that basis can succeed.
2. The Appeal should therefore be dismissed with costs. In the circumstances of the current coronavirus (COVID-19) crisis, it is appropriate to direct that the orders dismissing the appeal not take effect until 30 June 2020. That time may be extended further depending on how the situation develops. The effect of the direction will be that the time to apply for special leave to appeal will not begin to run until 30 June 2020.

|  |
| --- |
| I certify that the preceding fifty-four (54) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Perram. |

Associate:

Dated: 26 March 2020