FEDERAL COURT OF AUSTRALIA

AAY18 v Minister for Home Affairs [2018] FCA 1844

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| Appeal from: | *AAY18 v Minister for Immigration and Border Protection* [2018] FCCA 1432 |
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| File number: | NSD 938 of 2018 |
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| Judge: | **COLVIN J** |
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| Date of judgment: | 27 November 2018 |
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| Catchwords: | **MIGRATION** - appeal from refusal by the Federal Circuit Court of application to review decision of the Immigration Assessment Authority - whether untranslated material before the Minister's delegate forms part of the review material to be considered by the Authority - whether Authority must obtain translation - consideration of s 437DD of the *Migration Act 1958* (Cth) - appeal dismissed |
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| Legislation: | *Migration Act 1958* (Cth) ss 473CB, 473CC, 473DC, 473DD |
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| Cases cited: | *AQU17 v Minister for Immigration and Border Protection* [2018] FCAFC 111  *AUH17 v Minister for Immigration and Border Protection* [2018] FCA 388  *BVZ16 v Minister for Immigration and Border Protection* [2017] FCA 958; (2017) 254 FCR 221  *BPC16 v Minister for Immigration and Border Protection* [2018] FCA 920  *Minister for Immigration and Border Protection v BBS16* [2017] FCAFC 176 |
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| Date of hearing: | 23 November 2018 |
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| Registry: |  |
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| Division: |  |
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| National Practice Area: |  |
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| Category: | Catchwords |
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| Number of paragraphs: | 29 |
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| Counsel for the Appellant: | The Appellant appeared in person with the assistance of an interpreter |
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| Counsel for the First Respondent: | Mr P Knowles |
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| Solicitor for the First Respondent: | Mills Oakley Lawyers |
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| Counsel for the Second Respondent: | The Second Respondent filed a submitting notice save as to costs |

ORDERS

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|  | | NSD 938 of 2018 |
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| BETWEEN: | AAY18  Appellant | |
| AND: | MINISTER FOR HOME AFFAIRS  First Respondent  IMMIGRATION ASSESSMENT AUTHORITY  Second Respondent | |

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| JUDGE: | COLVIN J |
| DATE OF ORDER: | 27 NOVEMBER 2018 |

THE COURT ORDERS THAT:

1. The appeal be dismissed.
2. Within 45 days of agreement or assessment as the case may be or such further time as may be ordered by this court, the appellant do pay the first respondent's costs of the appeal.

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

REASONS FOR JUDGMENT

COLVIN J:

1. The appellant is a Sri Lankan national who left Sri Lanka by boat in 2012 and travelled to Australia. He is of Tamil ethnicity. When the Immigration Assessment Authority considered his application for a protection visa the following aspects of his account were accepted by the reviewer:
2. the appellant is a jeweller by trade;
3. he describes himself as financially well‑off;
4. after he married in 2004, the appellant moved from Colombo (where he had been working for number of years) to a village in the Eastern Province of Sri Lanka (his original home);
5. from 2006, the appellant was regularly subjected to extortion of small amounts of money;
6. in 2011, the appellant did some jewellery work for a police officer. When the appellant sought to recover the balance due he was involved in a physical altercation with the police officer;
7. the appellant was visited at his home by the police officer who attempted to shoot him, but missed;
8. after the shooting incident the appellant went to Colombo for a time;
9. the appellant returned to his home village to celebrate his daughter's first birthday. He stayed with his mother rather than at his own home. His wife was visited by the police officer with two others saying they knew he had returned. They made threats. The police officer said he had a photo of the appellant on his phone and he would send the photo to his police friends and arrest and torture the appellant; and
10. after that the appellant left the village but returned to his village in the months leading up to his departure by boat.
11. The Authority considered a claim that on one occasion the appellant had been subjected to a more detailed threat that demonstrated knowledge of his regular movements. By reference to the material concerning the appellant's subsequent behaviour, the Authority concluded that he did not perceive the demands to be problematic (at para 22). The Authority reviewer found as to the extortion claims that:

I am satisfied that the people who were extorting the applicant were motivated by financial gain and the applicant's willingness to pay. In the circumstances, I do not consider that reasons outlined in s 5J of the Act, including the applicant's ethnicity and occupation as a goldsmith [were the motivation].

1. The Authority then made findings to the effect that the appellant's willingness to return to his home village in 2011 and 2012 indicated that he considered it was safe to do so (para 31). It did not accept that criminal charges existed against him (para 34). It also noted that the appellant had not indicated in his written claims or during his interview that he had ever been involved with the Liberation Tigers of Tamil Eelam (**LTTE**) or experienced adverse interest from authorities on the basis of his ethnicity or area of origin (para 36). The reviewer found 'I do not consider the applicant has a profile with the Sri Lankan authorities, including the police, which would result in their adverse interest in him on return to Sri Lanka' (para 42).
2. The Authority affirmed the decision not to grant the appellant a protection visa. The appellant sought judicial review in the Federal Circuit Court. His application was dismissed. The appellant now brings an appeal. He raises five grounds.
3. The appellant appeared on his own behalf. He relied upon five grounds raised in a written notice of appeal (with particulars) and an additional ground provided the day before the hearing. The Minister opposed leave to advance the new ground on the basis that it lacked merit.
4. The appellant made submissions orally. They did not deal with the grounds. Rather they explained the appellant's concern and belief that he would be abducted by various groups if he returned and if he did not pay money he would be in danger. I note that these submissions go well beyond the claims that were made in the appellant's statement provided in support of his application of a protection visa.
5. For the following reasons none of the grounds demonstrates error by the primary judge.

## Ground 1: Failure to consider an untranslated document

1. The statutory provisions applicable to the review conducted by the Authority provide for a 'fast track' process. Generally speaking, decisions to refuse a protection visa must be reviewed under the fast track process. Under s 473CB of the *Migration Act 1958* (Cth), material that was before the Minister when the visa application was considered must be provided to the Authority. Section 473CC then requires the Authority to review the decision. The Authority must review the decision 'by considering the review material'. The Authority is prohibited from considering new information unless the exceptions stated in s 473DD apply. The exceptions are considered below in the context of other grounds raised by the appellant.
2. The material provided to the Authority included an untranslated document dated 30 November 1989. The Authority reviewer noted that the applicant in his claims for protection made no reference to an incident occurring in 1989. The Authority reviewer then stated that she was unable to consider the untranslated text or its relevance (para 4). Before the primary judge, it was claimed that the failure to consider the content of the document was a failure to perform the statutory duty to review the decision by considering the review material. The claim was rejected.
3. The term 'new information' is used in s 473DC(1) to refer to:

any documents or information that

(a) were not before the Minister when the Minister made the decision under section 65; and

(b) the Authority considers may be relevant.

1. As I have noted, new information cannot be considered unless the exception provided for in s 473DD applies. Within the scheme of provisions providing for fast track review, the definition of what is new provides some contextual indication as to what formed part of the 'review material' that the Authority was required to consider.
2. Plainly, the definition of new information draws a distinction between documents and information. Expressed in those terms the Act contemplates that the material before the Minister may be a document or information. The two terms are not defined. In this case, the untranslated document was before the Minister (but as there was no translation) with the consequence that the information that might have been gained from a reading of the document was not before the Minister. The evident scheme of the provisions relating to the fast track process is to provide for the transmission to the Authority of all that was before the Minister and then for the Authority to undertake a review of that material only, unless the exceptions to the prohibition in s 473DD upon considering any new information apply. It would be inconsistent with that scheme if information that was not before the Minister in any meaningful way (such that it might bear upon the decision) would be required to be translated and considered by the Authority for the first time without the exception applying. Within the scheme of the Act if material is to be relied upon in support of an application then the translation must be provided to the Minister so that in the event that the application is refused then the translation will form part of the material transmitted to the Authority on review.
3. For those reasons, the information that might have been gleaned by translating the untranslated document that was before the Minister was not part of the 'review material' transmitted to the Authority. Therefore, a translation of that material could only be received on the basis that it was new material to which the exception in s 473DD applied. It follows that ground 1 does not demonstrate error in the decision by the primary judge.

## Ground 2: Information alleged to have been wrongly identified as new information

1. The Authority did not accept claims made in a submission to the effect that the appellant had been imputed with LTTE involvement in the past. This was categorised as a new claim that was not before the delegate of the Minister who made the decision refusing the application.
2. The primary judge found that there was nothing to support the contention that the claim had been previously raised. Nothing has been advanced on appeal to demonstrate error in that finding. Therefore, this ground has not been made out.

## Ground 3: Alleged claim about being a member of goldsmiths subjected to extortion

1. Ground 3 alleges that the appellant advanced a claim that he was a member of a particular social group in Sri Lanka, namely goldsmiths who were subject to extortion.
2. The primary judge found that no such claim was raised. Nothing has been raised on appeal to demonstrate where such a claim was advanced in terms. Even so, I note that the claims made in relation to extortion were evaluated by the Authority and it concluded that those matters were not directed at the appellant by reason of his occupation as a goldsmith. This conclusion is supported by the appellant's own statement (see below).
3. As I have noted, the appellant made an oral application to add a further ground to the effect that there was jurisdictional error by the Authority in not considering an integer of the appellant's claim which was that he had a well-founded fear of persecution as a member of a social group being persons who are and are perceived to be wealthy. A claim of such error was not made before the primary judge. Further, a submission to that effect was not raised in the submission to the Authority by the appellant's migration agent.
4. In the statement that the appellant provided in support of his application for a visa he said that he described the reasons for the extortion of money from him in the following terms (para 12):

They were asking me for money because most goldsmiths are very rich and they knew we have money. Not all goldsmiths have this problem but I faced this because I am Tamil as the people calling me were Singhalese. I knew this from the way they spoke as they could not speak Tamil.

1. He also described the reason he was not safe was because there are Singhalese everywhere and they will cause trouble to the appellant as there is no respect for Tamils in Sri Lanka.
2. Accordingly, there is no evidence of an integer of claim of the kind sought to be raised by the further ground. Therefore, there could be no error in failing to consider a claim of that kind.

## Ground 4: Letter from a justice of the peace as new information

1. Ground 4 alleges that the Tribunal applied s 473DD incorrectly and should have considered a letter from a justice of the peace that was advanced as new information. It was said that as the Authority concluded that the requirement in s 473DD(b)(ii) was met the letter should have been received as new information.
2. Section 473DD of the *Migration Act* limits the circumstances in which the Authority can consider new information. Two requirements must be met before the Authority can do so. First, the Authority must be satisfied that there are exceptional circumstances to justify considering the new information: s 473DD(a). Second, the applicant before the Authority must satisfy the Authority that the new information either (i) was not and could not have been provided to the Minister before the decision on the visa application; or (ii) is credible personal information not previously known and had it been might have affected the consideration of the applicant's claims: s 473DD(b).
3. They are cumulative requirements: *AQU17 v Minister for Immigration and Border Protection* [2018] FCAFC 111 at [13]. Nevertheless, they may overlap: *BVZ16 v Minister for Immigration and Border Protection* [2017] FCA 958; (2017) 254 FCR 221 at [9] (a view approved and applied in *Minister for Immigration and Border Protection v BBS16* [2017] FCAFC 176 at [102]).
4. If one requirement is not met, then the new information must not be considered. There is no need to go on and consider whether the other requirement is met: *AUH17 v Minister for Immigration and Border Protection* [2018] FCA 388 at [26] and *BPC16 v Minister for Immigration and Border Protection* [2018] FCA 920 at [98].
5. In this case, the Authority found that as to the second requirement s 473DD(b), the second limb in (ii) had been met, but not the first in (i) (para 13). As they are alternatives, the result of those findings was that the second requirement was found to be met. However, as noted above, both requirements must be satisfied. Further, the first and second requirements are overlapping so the finding as to the first limb was still relevant when considering whether there were exceptional circumstances. The reviewer then dealt with the first requirement of exceptional circumstances and was not satisfied that it had been met for reasons that are not challenged.
6. It follows that the primary judge was correct to not uphold ground 4.

## Ground 5

1. The primary judge refused an application for an adjournment made on the day of the hearing. Reasons were provided for the refusal. No reason has been advanced as to why the discretionary decision whether to grant an adjournment was in error. Nothing has been said about what might have been done if an adjournment had been granted. No disadvantage to the appellant has been identified in terms of arguments that could have been advanced, but were not considered.

## Conclusion

1. As error has not been demonstrated, the appeal must be dismissed. No reason was advanced as to why costs should not follow the event. The appellant should pay the costs of the appeal. The appellant said that he would need time to pay any costs order. I am not satisfied that is a reason why a costs order should not be made. He may seek time to pay informally or seek a time to pay order with the necessary evidence in support if required. I will provide for a period of 45 days in which to make payment to facilitate those steps being taken.

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| I certify that the preceding twenty-nine (29) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Colvin. |

Associate:

Dated: 27 November 2018