FEDERAL COURT OF AUSTRALIA

BEU16 v Minister for Immigration and Border Protection [2018] FCA 1416

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| Appeal from: | *BEU16 v Minister for Immigration & Anor* [2017] FCCA 3385 |
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| File number: |  |
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| Judge: | **KENNY J** |
|  |  |
| Date of judgment: | 17 September 2018 |
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| Legislation: | *Migration Act 1958* (Cth) |
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| Date of hearing: | 3 and 17 September 2018 |
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| Registry: |  |
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| Division: |  |
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| National Practice Area: |  |
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| Category: | No Catchwords |
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| Number of paragraphs: | 40 |
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| Counsel for the Appellant: | The Appellant in person with the assistance of an interpreter |
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| Counsel for the First Respondent: | Mr A Cunynghame |
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| Solicitor for the First Respondent: | Sparke Helmore |
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| Counsel for the Second Respondent: | The Second Respondent submitted to any order, save as to costs |

ORDERS

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|  | | VID 1418 of 2017 |
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| BETWEEN: | BEU16  Appellant | |
| AND: | MINISTER FOR IMMIGRATION AND BORDER PROTECTION  First Respondent  ADMINISTRATIVE APPEALS TRIBUNAL  Second Respondent | |

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| JUDGE: | KENNY J |
| DATE OF ORDER: | 17 SEPTEMBER 2018 |

THE COURT ORDERS THAT:

1. The appeal be dismissed.
2. The appellant pay the first respondent’s costs of the appeal, as agreed or taxed, up to and including the hearing on 3 September 2018; and thereafter the first respondent bear his own costs of the proceeding.

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

REASONS FOR JUDGMENT

KENNY J:

1. This is an appeal from the judgment of the **Federal Circuit Court** of Australia delivered on 11 December 2017, dismissing an application for judicial review of a decision of the Administrative Appeals Tribunal (**Tribunal**) dated 9 May 2016. The decision has the citation *BEU16 v Minister for Immigration & Anor* [2017] FCCA 3385. The Tribunal had affirmed a decision of a delegate of the respondent Minister (**delegate**) dated 31 March 2014 to refuse the appellant’s application for a Protection (Class XA) visa (**protection visa**).
2. The hearing of the appeal was listed for 3 September 2018. Prior to that date, the respondent Minister had filed written submissions, although the appellant has not done so. However, the appellant appeared in person at the hearing on 3 September 2018. With the aid of an interpreter, he briefly responded to the Court.
3. Before dealing with the substantive issues on the appeal, it is convenient to refer first to an issue that arose at the hearing on 3 September 2018. It came to my attention that several documents referred to in the Tribunal’s reasons were missing from the appeal book. Specifically:

* two letters on which the appellant had apparently relied in the Tribunal, one dated 16 November 2013 and another dated 7 November 2013, each from a different individual but both referred to at [29] of the Tribunal’s reasons; and
* two of the four affidavits (see [26] of the Tribunal’s reasons) on which the appellant had also apparently relied in the Tribunal.

1. Since counsel for the first respondent was unable to locate the documents at the hearing, or throw any light on them, I adjourned the hearing to give the first respondent an opportunity to explain the situation and to allow the parties to make such submissions as they saw fit.
2. In compliance with the orders made on 3 September 2018, the first respondent filed short submissions dated 12 September 2018, accompanied by an affidavit affirmed by Mr Adam Cunynghame, a solicitor employed by the solicitors for the first respondent, on 7 September 2018. This affidavit annexed the missing the documents.
3. Mr Cunynghame deposed that, through an administrative oversight, the documents were omitted from the court book filed by the first respondent in the Federal Circuit Court proceeding on 9 November 2016. He further deposed that the appeal book filed in the current proceeding included the court book as filed in the Federal Circuit Court. As a result, the two letters and the two affidavits were not before this Court.
4. The first respondent submitted that:

… the [Tribunal] did not overlook cogent evidentiary material that was central and material to the appellant’s claims and the Tribunal’s decision, it having expressly addressed the letters and further affidavits in its decision at paragraphs 26 and 29. Accordingly, it cannot be said that the [Tribunal] overlooked the letters and further affidavits in considering the credibility of the appellant’s protection claims.

(footnotes omitted)

1. At the adjourned hearing, the Court explained the respondent’s further submissions to the appellant. After the appellant had indicated that he might wish to file further affidavit material, the Court explained the nature of its jurisdiction to him and the appellant said to the Court that he had nothing further to add by way of submissions in relation to this matter.
2. I am satisfied, after reading the missing letters and affidavits and the Tribunal’s reasons, that the first respondent’s submission should be accepted. It is clear from the Tribunal’s reasons that the Tribunal had regard to this material in making its decision and that the content of the letters and affidavits are in conformity with the Tribunal’s reasons. In these circumstances, nothing turns on the omission of the documents from the appeal book in the current proceedings.

# Background

1. The appellant is a citizen of Sri Lanka. He arrived in Australia on 19 July 2012. On 17 December 2012, he applied for the protection visa.
2. In summary, he said that he was a supporter of the United National Party (**UNP**) and left Sri Lanka because of the difficulties he had due to his political involvement. He gave the following account of his political involvement and the harm that ensued.
3. The appellant stated that his father was a UNP voter but was never involved in politics. In 1993 or 1994 his father was asked to join the People’s Alliance (**PA**) party, but refused to do so. His father was taken to the town, undressed and beaten badly. His father never recovered fully from the incident and one or two months later his father committed suicide. The appellant was very angry when he fully understood what happened to his father, and joined the UNP in 2006. Less than six months after he joined the UNP, he was warned by members of the PA to stop his involvement with the UNP or the same thing would happen to him as to his father. The appellant stated that was continuously harassed by the PA and was beaten by them on four or five occasions. He was attacked by five or six people in 2010 during the election and beaten badly. He lost two teeth. He was afraid the attackers would find him if he went to hospital so he went to a local GP for treatment. After this incident he did not feel safe, so he went to Qatar for one year and two months. About three months after he returned to Sri Lanka, the problems started again. Although he was not involved in politics anymore, he continued to be threatened and harassed by the PA. Since he left Sri Lanka, PA members came looking for him at his home, and have threatened to kill him if he returns to Sri Lanka. A little under a year later, two men with helmets on their heads told his wife that when he returns to Sri Lanka, he must report to the PA village organiser.
4. On 3 October 2013, the appellant attended an interview before the delegate, and as already indicated, on 31 March 2014, the delegate refused to grant him the protection visa on the basis of adverse credibility findings.
5. On 7 April 2014, the appellant applied to the Tribunal for review of the delegate’s decision. After a hearing, the Tribunal affirmed the delegate’s decision. On 22 December 2015, the Federal Circuit Court made orders, by consent, quashing the Tribunal’s decision and remitting the application for review to the Tribunal for reconsideration according to law.
6. On 29 March 2016, the appellant was invited to attend a hearing before the Tribunal on 3 May 2016. On that date, the appellant appeared before the Tribunal to give evidence and present arguments with the assistance of his representative and a Sinhalese interpreter. As already indicated, on 9 May 2016, the Tribunal affirmed the delegate’s decision not to grant the appellant the protection visa, essentially because it did not consider the appellant to be a credible witness.
7. In summary, the Tribunal considered that the appellant’s evidence regarding the UNP was limited and not consistent with what the appellant claimed to be his level of involvement and profile with the UNP. The Tribunal found it far-fetched that the appellant would obtain the role of UNP village representative within the year he joined the party as claimed.
8. The Tribunal had regard to the appellant’s evidence at his first hearing before the Tribunal (differently constituted) that he had helped with campaigning during the parliamentary election in 2010. The Tribunal observed that the Sri Lankan parliamentary elections occurred in April 2010 when the appellant was working in Qatar. The Tribunal also had regard to the fact that, when it put to the appellant that he was in Qatar at the time of the 2010 elections, the appellant said he could not remember. The Tribunal found that the appellant’s inability to accurately recall the 2010 elections reflected adversely on his credibility.
9. The Tribunal noted that, in the appellant’s statement of claims, he said he joined the UNP in 2006, but that a letter submitted from a named individual (identified as a Member of Local Government, Group Organiser, UNP) dated 16 November 2013 referred to the appellant assisting in the election of the UNP in 2001. The Tribunal found that the appellant’s explanation of this was vague and did not adequately explain the inconsistency. The Tribunal considered that the letter detracted from the credibility of his claims.
10. The Tribunal considered it far-fetched and implausible that, if the appellant was of such importance to the UNP in his village, he was subject to threats and four to five physical assaults between 2006 and 2010, that he would consider it safe to return to Sri Lanka after just fourteen months in Qatar and within sixteen months of a claimed brutal assault.
11. The Tribunal considered the appellant’s evidence at the first Tribunal hearing that he was not involved with the UNP after he returned from Qatar to be inconsistent with evidence given at his second Tribunal hearing that he did have some subsequent limited involvement. The Tribunal found the appellant’s explanation of the inconsistency to be vague and found the inconsistency detracted from his credibility.
12. The Tribunal considered the claimed incidents in July 2015 and March 2016 set out in the statutory declarations made by the appellant’s wife and sister. The Tribunal also had regard to the appellant’s evidence that the PA wanted him to change parties and help them get people in his village to vote for them. The Tribunal did not find it plausible that the PA would think the appellant could be convinced to assist them, if he was as involved in the UNP as he had claimed. The Tribunal also found it far-fetched and implausible that, if the PA wanted him to assist them, they would have threatened to kill him. As the appellant had not been in Sri Lanka since 2012 and he said he had not acted as the UNP village organiser since 2010, the Tribunal found it implausible and far-fetched that he would be of any continuing interest to political opponents several years later.
13. The Tribunal accepted that the appellant’s father was asked to join the PA, was badly beaten when he refused, and later committed suicide. Given its “highly significant and fundamental concerns” about the appellant’s credibility, however, the Tribunal did not accept that the appellant had assisted a particular named politician in any way in his election and campaigns from 2001. The Tribunal did not accept that the appellant had joined the UNP in 2006 or was ever a member or was involved with the party. The Tribunal did not accept that the appellant was beaten or assaulted by members of the PA on any occasion. The Tribunal also did not accept that the appellant went to Qatar because he did not feel safe, or that any PA members visited his house after he came to Australia to look for him, and threatened to kill him if he returned. The Tribunal did not accept that the appellant was of any adverse interest to the PA or any political opponents of the UNP. Having regard to the appellant’s lack of involvement with the UNP in the past, the Tribunal did not accept that the appellant would involve himself in the UNP on return to Sri Lanka.
14. The Tribunal had regard to the affidavits provided in support by the appellant’s wife and sister, and the two letters to which reference was made at the outset of these reasons. Due to the “highly significant and fundamental” concerns it had with the appellant’s credibility, the Tribunal gave these documents no weight.
15. Whilst the Tribunal accepted that the appellant’s father had been beaten by the PA, it found that this incident occurred over twenty years ago when the appellant was a child, and that the chance, or risk, of the appellant being seriously harmed or significantly harmed because of this event was remote.
16. Having regard to the appellant’s individual circumstances, the Tribunal found that the appellant did not face a real chance of persecution for reasons of his actual or imputed political opinion, or membership of a particular social group consisting of his family, or for any other Convention reason. The Tribunal also found that there was not a real risk that the appellant would suffer significant harm on return to Sri Lanka on these bases.
17. The Tribunal accepted that the appellant departed Sri Lanka illegally and had regard to country information regarding the treatment of such returnees to Sri Lanka. The Tribunal found that the provisions of the Sri Lankan *Immigrants and Emigrants Act* which dealt with irregular departure enforced a law of general application, and were not discriminatory in nature.
18. Having regard to country information, the Tribunal found that offenders in the appellant’s circumstances would not face imprisonment. Whilst it found that the appellant would be fined on return to Sri Lanka, any short term detention or fine did not, so it held, amount to persecution for a Convention reason as required by s 91R(1)(c) of the *Migration Act 1958* (Cth) (**Act**) because it was the enforcement of a generally applicable law and not discriminatory. The Tribunal further found that the above factors, including being detained for a short period and fined did not constitute serious harm.
19. The Tribunal also found that any short term detention, questioning or imposition of a fine that the appellant may face on his return to Sri Lanka did not amount to significant harm for the purposes of s 36(2A) of the Act. Having regard to country information, the Tribunal found that prison conditions in Sri Lanka were poor but that the short term nature of detention he faced meant that this detention would not constitute significant harm. The Tribunal also considered country information in finding that poor prison conditions did not involve an intention to inflict harm or suffering on the appellant, and that the risk that the appellant would be subjected to torture, or any other form of significant harm was “remote”. Further, the Tribunal found that, by reason of s 36(2B)(c) of the Act, any treatment the appellant would face upon return to Sri Lanka would apply to every person in Sri Lanka who breached the illegal departure law, and, as this was a real risk faced by the population generally and not the appellant personally, it was taken not to be a real risk that the appellant would suffer significant harm.
20. In considering the appellant’s individual circumstances and independent country information cumulatively, the Tribunal found that the appellant did not face a real chance of serious harm, and therefore concluded that the appellant did not satisfy the criterion in s 36(2)(a) of the Act.
21. In considering the appellant’s individual circumstances and independent country information cumulatively, the Tribunal also found that there was not a real risk that the appellant would suffer significant harm on return to Sri Lanka, and therefore concluded that the appellant did not satisfy the criterion in s 36(2)(aa) of the Act.

# Federal Circuit Court proceedings

1. By an application dated 19 May 2016, the appellant sought judicial review of the Tribunal’s decision in the Federal Circuit Court, on the grounds that:

1. The Administrative Appeals Tribunal did not afford me procedural fairness.

2. The Administrative Appeals Tribunal applied the wrong legal test.

1. The application was heard on 11 December 2017. The appellant appeared in person. On the same date, the Federal Circuit Court dismissed the appellant’s application.
2. In relation to the appellant’s first ground, the primary judge found that there was no doubt the appellant was given a hearing, and had the assistance of an interpreter and a representative. The primary judge found that, as the delegate had refused the appellant’s application on the basis of his credibility, he was on notice that his credibility was a real issue for the Tribunal hearing. The primary judge found that there was nothing in the appellant’s case to indicate he was denied procedural fairness.
3. In relation to the appellant’s second ground, the primary judge noted that the Tribunal set out the law at the commencement of its decision and that its conclusions appeared to be open to the Tribunal on the evidence.
4. The primary judge found that neither of the appellant’s grounds were made out, and dismissed the application with costs.

# The Appeal

1. The appellant appeals from this judgment. The appellant’s notice of appeal states the following grounds of appeal:

1. The proceeding in the order which the application relates was pronounced involves a question of law.

2. There is a jurisdictional error occurs in the order.

1. These grounds are, as the respondent Minister observed, broadly consistent with the appellant’s second ground of review set out in his originating application in the Federal Circuit Court. Since the appellant has not given any particulars, or details, of his very broad assertions, and has not pointed to any specific error allegedly made by the primary judge, it is difficult to identify whether he has any specific complaint and to address that complaint. The appellant made brief oral submissions at the hearing on 3 September 2018, in summary, to the effect that the Tribunal was wrong not to accept the evidence he gave of the political problems he was facing in Sri Lanka.
2. The Tribunal set out the relevant law correctly with respect to the refugee criterion in s 36(2)(a) and the complementary protection criterion in s 36(2)(aa) of the Act. It apparently made its findings on the basis of the law, correctly stated; and there is nothing in its reasons to indicate that these findings were not reasonably open to it on the evidence before it.
3. The appellant has in substance disputed the Tribunal’s rejection of his claims about the harm he suffered on account of his political activities. The appellant has not, however, identified any relevant jurisdictional error in the Tribunal’s decision, and has not shown any basis on which it might be said that the primary judge erred in finding that there was none. I would add that there was no discernible basis for the appellant’s claim before the primary judge that the Tribunal breached procedural fairness in some unidentified way.

# Disposition

1. Since there is no appellable error shown on the part of the primary judge, the appeal must fail. The appeal should be dismissed. The appellant should pay the first respondent’s costs of the appeal up to and including the hearing on 3 September 2018, as agreed or taxed. The first respondent should bear his own costs of and related to the adjournment of that hearing, including any costs associated with the hearing and delivery of judgment today.

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

Associate:

Dated: 17 September 2018